Petition

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81-1109

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. _____

ROBERT W. KIRK AND ASSOCIATES, INC., et al,

Petitioner/Appellant,

vs.

JESSE HOLCOMB,

Respondent/Appellee/Claimant,

and

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Is the statutory presumption under the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C. Section 920(a) applicable to jurisdictional questions as to whether or not a claimant is, in fact, covered under the Longshoremen's and Harbor Workers' Compensation Act?

2. Is it an abuse of discretion on the part of a Circuit Court of Appeals to substitute their factual interpretation in place of those findings of an Administrative Law Judge in violation of the Administrative Procedure Act 5 U.S.C. 1001 et seq.?

3. Did the Circuit Court of Appeals error in utilizing pre-1972 cases for the interpretation of maritime status when such cases were decided prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act and prior to the time that there was any status requirement in the Longshoremen's and Harbor Workers' Compensation Act?

4. Did Congress intend in it's 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, to continue coverage for those claimants injured on the navigable waters as they would have been covered prior to the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act?

5. Was it an abuse of discretion and error in interpretation on the part of the Circuit Court of Appeals in finding that a guard who was to watch a vessel from a truck who performed other tasks for the same employer involving land operations and was given the same instructions in all of his duties as a watchman to be considered a maritime employee under the Longshoremen's and Harbor Workers' Compensation Act?

6. It is an abuse of the Constitution of the United States of America for the Appellate Court to utilize a presumption 33 U.S.C. Section 920(a) in determining Federal jurisdiction in light of the 5th and 10th Amendments of the United States Constitution?

7. Is it an abuse of discretion for the Circuit Court of Appeals to base their decision in the instant case on a remanded and revised decision which revised order was entered prior to the issuance of the Appellate order now in question?

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vs.

JESSE HOLCOMB,

Respondent/Appellee/Claimant,

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UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgments of the United States Court of Appeals for the Fifth Circuit entered on September 8, 1981.

OPINIONS BELOW

The opinion of the Administrative Law Judge (R 25) is an unreported decision designated as OALJ No. 77-LHCA-1238 entered on September 14, 1978. The opinion of the Benefits Review Board (R 39) is reported at 11 BRBS 835 (1980). The opinion of the Court of Appeals for the Fifth Circuit (R 60) is currently unreported but is identified as No. 80-5246 and was decided on September 8, 1981.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on September 8, 1981 (R 60) and a copy thereof is attached to this petition in the appendix at pages 60 . A petition for rehearing was denied on October 7, 1981 (R 66) and a copy thereof is appended to this petition in the appendix at page 66 . The jurisdiction of this Court is envoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are the due process clause of the Fifth Amendment and the Tenth Amendment to the United States Constitution. The statutes in question is centered on 33 U.S.C. 901 et. seq. and more specifically 33 U.S.C. Section 920(a) also identified as the Longshoremen's and Harbor Workers' Compensation Act Section 2(3).

STATEMENT

This action arises under the Longshore and Harbor Workers' Compensation Act as amended in 33 U.S.C. Section 901 through 950. The claimant in the case, Jesse Holcomb, was an employee of Robert W. Kirk and Associates, Inc. when he was injured on March 13, 1975 on a vessel owned and operated by United Steel Corporation. Said vessel was moored at the Hoover Marine Docks in Titusville, Brevard County, Florida for the purposes of renovation and overhauling of the vessel.

Mr. Holcomb had been employed by Robert W. Kirk and Associates for the purposes of guarding the vessel as a watchman but both simultaneously and prior to the accident had performed the job of watchman of such varied projects of his employer as a watchman for an orange grove, a warehouse and construction projects and in all instances both in watching the vessel and land based projects Mr. Holcomb

was given similar instructions as to his work responsibility. In fact, Mr. Holcomb had been instructed to watch the vessel from a land based position, more specifically, the cab of a truck rather than watching said vessel from the vessel itself.

Mr. Holcomb's only instructions regarding watching the vessel were those of the land based projects, more specifically, to inform the police in the event that people came either upon any of the land based projects or the vessel.

The claimant initially filed his case under the Florida Workers' Compensation Act and was denied benefits for lack of jurisdiction.[1]

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[1]The original hearing before the state compensation did not involve the undersigned counsel who was not retained until the original hearing on the Longshore claim. Further, at the state compensation hearing, the employer was represented only by the state workers' compensation carrier which carrier did not insure the employer under the Longshore and Harbor Workers' Act.

The claimant, after denial under the Florida Workers' Compensation Act, never attempted to apply for an appeal under the State Compensation Act and, further, never applied for a modification of denial which said modification was available under Florida Law for a period of two (2) years after the date of the original denial (Fla. Statutes 440.28) (R 68). All opinions are contained in the append

In fact, the claimant had the opportunity to reapply to the Judge of Industrial Claims under the Florida Law for approximately one month after the denial under the Longshore and Harbor Workers' Compensation Act by the Administrative Law Judge. The hearing before the Administrative Law Judge was held on June 9, 1978 with an order by the Administrative Law Judge denying Mr. Holcomb the benefits on September 14, 1978 (R 25).

In the Judge's order after having considered all of the facts and the case law presented at the hearing, made the determination that under the factual circumstances of Mr. Holcomb's

case, that he had not met the status requirement of the Longshore and Harbor Workers' Compensation Act with a total denial of benefits. The Judge specifically found that the claimant's work was not an "ingredient part" of any shipbuilding or ship repair operation.

The case was appealed to the Benefits Review Board with the Benefits Review Board after oral argument entering their order on February 28, 1980 (R 39). The Benefits Review Board with Administrative Appeals Judge Miller dissenting, entered an order upholding the order of the Administrative Law Judge finding that the claimant did not meet the status requirement under the Longshore and Harbor Workers' Compensation Act. The claimant was then appealed his case to the Fifth Circuit Court of Appeals[2] and after oral argument the Court entered it's order of September 8, 1981 reversing and remanding the decision of the Benefits Review Board and Administrative Law Judge and found that the

[2]Unit B of the 5th Circuit Court of Appeals has now become the 11th Circuit Court of Appeals.

clamaint was within the status requirement of the Longshore and Harbor Workers' Compensation Act.

The Fifth Circuit Court of Appeals appeared to premise it's decision on two main points. The first being that the Court was bound by the statutory presumption in considering jurisdictional status that an individual claim comes under the acts coverage (33 U.S.C. Section 920(a)). Secondly, that pre-1972 decisions by virtue of Fusco vs. Perrini North River Associates, 601 F.2d 659 (2nd Circuit 1979) would be applicable as to whether or not a particular claimant comes under the Longshore and Harbor Workers' Compensation Act. It should be noted that the cited Fusco vs. Perrini North River Associates, case, supra, had been overruled by the 2nd Circuit itself in 622 F.2d 1111 (2nd Circuit 1980) upon being remanded to the 2nd Circuit by the United States Supreme Court (44 U.S. 1028; 100 S.Ct. 697; 62 L.Ed. 2d 644, 1980).

The Fifth Circuit in reviewing the Holcomb decision after citing an extensive quote from the overruled Fusco vs. Perrini North River Associates, case, supra, cited four pre-1972 cases in finding what appeared to be a per se determination that a guard of a vessel comes under the Longshore and Harbor Workers' Compensation Act. The Court then tempered it's finding by stating that they are not holding that every watchman of a vessel on navigable waters comes under the Longshore and Harbor Workers' Act but, simply finding that under the facts of this case, Holcomb, the petitioner, is covered by the Act.

While the Court did make a short summation as to the factual consideration in the Holcomb vs. Kirk case, they only reviewed those portions of the facts which appeared favorable to the claimant's position while referring to those jobs that the claimant had at the same time or of similar nature as only as a reference that the claimant "would perform other chores". Nowhere in their order did the Fifth Circuit

Court of Appeals find any discrepancy with the findings of fact of the Administrative Law Judge but as already stated, overruled the Administrative Law Judge and the Benefits Review Board on the basis of pre-1972 cases and the presumption that jurisdiction shall be presumed in favor of the claimant.

The Petition for Rehearing was sought and denied without an opinion (R 66).

REASONS FOR GRANTING WRIT

I

In it's order, the 5th Circuit, now 11th Circuit Court of Appeals clearly took the position that the Section 20(a) presumption applied to the question of jurisdiction. Quoting from the 5th Circuit decision on page 1104, "We are also bound by the statutory presumption that an individual claim comes under the acts coverage (33 U.S.C. Section 920(a)) (R 63). In the appellant's petition for rehearing before the same court the question of the application of the presumption was a key issue on which the application for rehearing was based. In the appellant's petition for rehearing before the same court the question of this issue was again set forth (R 66).

Since the presumption sets up the mechanics of interpretation on how to approach both the status of the situs question as set forth under the Longshore and Harbor Workers' Compensation Act, it becomes an essential ingredient in questions as to jurisdiction. Since the obligation of the presumption would set up a circumstance of placing a burden on the

employer to show rebuttable facts to overcome a presumption of the individual being under the Longshore and Harbor Workers' Compensation Act an entirely different interpretation of the jurisdictional affect of the case has been established.

There has been extensive controversy surrounding the question of the application of Section 20 presumption. In the case of Matteler vs. J. J. Jones Construction Co., 457 F.2d 917 (7th Circuit 1972) the 7th Circuit in interpreting Section 20 took the position that the presumption can only be triggered once the plaintiff has shown that the act is applicable to the case at bar, thus, barring an application of the Section 20 presumption to a jurisdictional question.

In Stockman vs. John T. Clerk and Son, 539 F.2d 264 (1st Circuit 1976) the 1st Circuit Court of Appeals on page 269 of the decision also came to the conclusion that the Section 20 presumption did not apply to the jurisdictional

question. In Alabama Dry Dock and Ship Building vs. Canesus, 1977 the 5th Circuit took the position that the Section 20 presumption did not apply to the question of jurisdiction. Yet, the newly formed 11th Circuit in the instant case was of the opinion that the presumption did apply to the jurisdictional question and has, thus, set up a conflict between the other Circuits. The importance of this interpretation can be shown in the recent Benefits Review Board case of Brown vs. Hydrodredge Corporation and Commercial Union Insurance Company, Case No. 79-721, 13th BRBS 788 where in his dissent Administrative Appeals Judge Miller questions the application of the Section 20 presumption to the threshhold issue of coverage. While certainly the appellant in this case is not arguing Judge Miller's position is correct, that the presumption should apply to the question of threshhold, it has been raised and will continue to be raised until determined by this Court.

It is alleged that since the 11th Circuit decision was without explanation as to how they arrived at their decision, that the application of the Section 20 presumption as written in the opinion played an active if not crucial part in the ultimate decision.

Ba ed upon the Court's decision of the application of the presumption there has now developed a conflict within the jurisdictions and the Court has presented a new interpretation of the presumption creating a new and important federal question, it is argued that the presumption was not intended to apply to the jurisdictional question and that if applied, it violates the 5th and 10th Amendment to the United States Constitution in that it is using a presumptive tool of statutory interpretation in extending the Federal Government's jurisdiction against those areas controlled by the State without any constitutional or even statutory basis but simply on the basis of a presumption. It is argued that the Section 20 presumption should not be extended

to an application of the jurisdictional question and that without the aid of Section 20 presumption that the decision of the 5th now 11th Circuit Court of Appeals would have been determined in favor of the employer/carrier.

It is therefore prayed that Certiorari be granted based on constitutional interpretation, conflict between circuits and as an important Federal question.

II

It is argued that both the Administrative Procedure Act (5 U.S.C. 1001 et seq.) and the case law have fully established the principal that the findings of an Administrative Law Judge are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole. In the order of the Appellate Court, the Court did not explain why the Administrative Law Judge's factual determination as to the fact that the claimant, Mr. Holcomb, was not involved in maritime employment was not based on substan-

tial evidence.

Rather, the Court seemed to apply a per se rule in using pre-1972 cases that a watchman of a vessel is automatically under the Longshore and Harbor Workers' Compensation Act. In other words, adding to that categories of the Act along with longshoremen, shipbuilders, shipbreakers and harbor workers the term watchman. But, then the Court contradicts it's own argument by stating on page 1106 of it's decision, "We do not hold that every watchman of a vessel on navigable waters comes under the Longshore and Harbor Workers' Compensation Act. We do hold that under the facts of this case, Holcomb, the petitioner, is covered under the Act."

The Appeals Court has done nothing to explain why the facts as determined by the Administrative Law Judge were not supported by substantial evidence. Stating it in reverse what was the irrational and unsupported evidence from the Administrative Law Judge.

The Administrative Law Judge utilized the facts as presented and went to great lengths to explain his determination in his order as to why Mr. Holcomb was not involved in maritime employment (R 25). It was the interpretation of the trier of fact as set down in his order that in this particular case the facts added up to an individual not being involved in maritime employment.

The United States Supreme Court has rendered decisions regarding the scope of Appellate review regarding decisions of the Administrative Law Judge. Quoting from the case of O'Keefe vs. Smith Hinchman and Grylls and Associates, 380 U.S. 359; 85 S.Ct. 1012; 12 L.Ed.2d 895 (1965), on page 897 of the decision,

> It matters not that the basic facts from which a deputy commissioner draws it's inference are undisputed other than controverted . . . It is likewise immaterial that the facts permit the drawing of diverse inferences. The deputy commissioner alone is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise substantial, may not be disturbed by a review in Court.

> Moreover, the facts of the inference of the type here made by the deputy commissioner involves an application of a broad statutory term or phrase to a specific set of facts gives rise to no greater scope of judicial review.

Going on on page 362,

> The rule of judicial review has therefore emerged that the inferences drawn by the deputy commissioner are to be accepted unless they are irrational or unsupported by substantial evidence and they are on the record as a whole.

As already stated, the appeals court has given no explanation as to why the deputy commissioner's determination of the facts was inadequate. The court's only explanation is the utilization of the Fusco vs. Perrini North River Associates case, 601 F.2d 659 (2nd Circuit 1979) the section 20 presumption and pre-1972 cases which took place prior to the establishment of the status test. It is also argued at this point that the one case utilized by the court in explaining the determination of maritime employment was the Fusco vs. Perrini North River Associates case, supra,

which case was referred back by the United States Supreme Court with a new decision being entered on June 4, 1980 in Fusco vs. Perrini North River Associates, 622 F.2d 1111 (2nd Circuit 1980). As stated, this case for all practical purposes overruled the original Fusco case.

It is therefore argued that the Court erred in substituting their determination of the facts in the particular case with that of the Administrative Law Judge in violation of the precedence set down in the above-cited cases. The only alternative determination that can be arrived at in upholding the Holcomb vs. Kirk case is for the Court to be laying down the precedent and the mandate that any watchman of a vessel is automatically included within the category of the Longshore and Harbor Workers' Compensation Act and the Administrative Law Judge only needs to determine whether or not the fact that the individual was watching a vessel in navigable waters.

III

In it's decision in the instant case the Circuit Court by the very nature of it's order premised it's interpretation of the claimant's case in pre-1972 cases which found that guards were under the Longshore and Harbor Workers' Compensation Act. It is difficult to conceive how the Appellate Court could have utilized pre-1972 cases since these cases obviously could give no consideration to the status requirement since it did not exist until the 1972 amendments and, thus, could not have been considered in the pre-1972 cases. The Circuit Court in it's order cited four pre-1972 cases that stood for the proposition that a guard would be under the Longshore and Harbor Workers' Compensation Act. It is argued that Congress specifically changed the interpretation of coverage under the Act by amending Section 2(3) (33 U.S.C. Section 920) requiring the status interpretation. In Weyerhauser vs. Gilmore, 528 F.2d 957 (9th Circuit 1976 Cert. denied 429 U.S. 868 1966) the 9th Circuit

found no relevance in utilizing pre-1972 cases in making a determination as to whether or not an individual came under the Longshore and Harbor Workers' Compensation Act.

In the instant case the Circuit Court clearly stated in their interpretation that Congress was only concerned with altering land based injuries and that there was no consideration by Congress in withdrawing existing coverage or eligibility.[3]

The Court then, as has already been argued, went on and considered and utilized the Fusco vs. Perrini North River Associates case, supra, for the purpose of further bolstering their argument that pre-1972 cases should be considered. As stated, the Fusco vs. Perrini North River Associates, 44 U.S. 1028; 100 S.Ct. 697;

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[3]Quoting from the decision (R 60) on page 64 , "There was no indication that Congress considered withdrawing existing coverage or eligibility. What's concerned Congress was injuries on land."

82 L.Ed 2d 644 case was appealed to the United States Supreme Court, was returned to the Second Circuit for the purposes of reconsideration in light of P. C. Pfeiffer Company vs. Ford, 62 L.Ed.2d 225 (1979) and in light of this decision a revised Fusco vs. Perrini North River Associates, 622 F.2d 1111 (2nd Circuit 1980) was issued overruling the first case.

It is thus argued that the Circuit Court of Appeals erred in utilizing pre-1972 cases in finding that the claimant, Jesse Holcomb, came under the Longshore and Harbor Workers' Compensation Act and that there is conflict between the various circuits on the application of pre-1972 Amendment cases.

IV

The Appellate Court was in error in finding claimant such as Mr. Holcomb was involved in maritime employment. As was stated in Sun Ship, Inc. vs. Commonwealth of Pennsylvania, 447 U.S.715, 100 S.Ct. 2432,

65 L.Ed.2d 458 (1980) on page 725 of the decision the court in referring to the jurisdictional compass of the Longshore and Harbor Workers' Compensation Act states

> The line that circumscribes the jurisdictional compass of the Longshore and Harbor Workers' Compensation Act, a compound of status and situs is no less vague than it's counterpart in the pre-twilight zone Jensen era.

The court gave no basis for it's factual finding, no basis for finding maritime employment and would appear to have based their decision solely on the question of situs. More specifically, that since at the time of his accident Mr. Holcomb had been watching a vessel from a truck and had, in fact, gone on board the vessel and was injured on the vessel, it would follow that in accordance with the fact that he was on board the vessel that he must be involved in maritime employment. There was no explanation as to why the administrative law judge's finding, after an extensive hearing and review of facts and exhibits, that there was not a nexus between the claimant's

employment and the maritime industry should be overruled in favor of a determination that the status requirement has been met.

This decision can only be interpreted in light of previous pronouncements in the Appellate Courts order of either establishing the principal that either any injuries on navigable waters are per se under the Act or that the "moment of rest theory" has been revived.

It is alleged that neither of these theories apply and the writ should be granted both on conflict and a federal question.

CONCLUSION

For the reasons aforesaid, it is respectfully prayed that a Writ of Certiorari be granted to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

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BY /s/ John M. Schwartz

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have forwarded 40 copies of the foregoing Petition for Writ of Certiorari by United States Mail to the Office of the Clerk, Supreme Court of the United States, Washington, D.C. 20543, 3 copies by United States Mail to Joshua T. Gillelan, II, Esq., U.S. Department of Labor, 200 Constitution Avenue, N.W., Suite N-2620, Washington, D.C. 20210, 3 copies by United States Mail to Paul Smalbein, Esq., P. O. Box 6086-C, Orlando, Florida and 3 copies by United States Mail to Michael Reda, Esq., P. O. Drawer 6310-G, Titusville, Florida 32780, this ___ day of December, 1981.

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Appendix

APPENDIX

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U.S. DEPARTMENT OF LABOR

OFFICE OF ADMINISTRATIVE LAW JUDGES

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In the Matter of	:
	:
JESSE HOLCOMB,	:Case No.
Claimant	:77-LHCA-1238
	:
against	:OWCP No.
	:6-30411
ROBERT W. KIRK AND ASSOCIATES, INC.	:
Employer	:
	:
FARM BUREAU MUTUAL INSURANCE COMPANY	:
Carrier	:

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Before: Robert L Ramsey
Administrative Law Judge

DECISION AND ORDER

This Proceeding arises out of a claim for benefits under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended (33 U.S.C. Section 901 et seq.), hereinafter referred to as "the Act", wherein the Claimant, Jesse Holcomb, seeks an award for permanent total disability commencing March 13, 1975, arising out of an injury to the Claimant's back which injury occurred on March 13, 1975, while the Claimant was in the employe of the Employer.

A hearing was held before the undersigned Administrative Law Judge on June 9, 1978, in Orlando, Florida, at which time the Claimant appeared in person and by his attorneys and wherein the Employer and Carrier each appeared by separate counsel. A full hearing was held and each party was given and exercised the full right of examination and cross examination of witnesses, exhibits were introduced into evidence, counsel for each party was given and exercised the right to make an opening statement (counsel for the Employer reserved his opening statement to the close of the Claimant's case at which time the same was made), and counsel for each party was given and exercised the right to make a closing statement. At the beginning of the hearing, counsel for the Employer submitted a memorandum which memorandum has been filed as part of the record in this case. At the conclusion of the hearing, counsel for the Claimant requested permission to file a brief in answer to the memorandum submitted by the Employer, which request was denied on the ground that counsel for the Claimant had ample opportunity to prepare a trial memorandum (such as counsel for the Employer prepared) and on the further ground that no novel or complex issue of law had been raised at the hearing

which could not be addressed on oral argument (see 20 C.F.R. Section 702.343). Further, prior to the hearing, the Solicitor's office had indicated that it would not appear at nor take part in the formal hearing, but requested permission to file a post-hearing brief on the question of the applicability of section 8(f) of the Act (33 U.S.C. Section 908(f)). In accordance with such request, following the hearing, the Solicitor was given the opportunity to submit a post-hearing brief and the record was held open to June 30, 1978, for the purpose of receiving such brief. The Solicitor's office did not submit a brief within the designated period and I deem the same to have been waived. The record was closed on June 30, 1978, and the case now stands ready for decision.

FINDINGS OF FACT

Stipulations

The parties have stipulated, and I find as follows:

1. On March 13, 1975, the Employer/Employee relationship existed between the Employer, Robert W. Kirk and Associates, Inc., and the Claimant.

2. That on March 13, 1975, while in the course and scope of his employment, the Claimant fell into the hold of the Krista K., a converted LCT.

3. As a result of the injuries sustained on March 13, 1975, the Claimant has been totally and permanently disabled since March 13, 1975.

4. That the injury to the Claimant arose out of and in the course of his employment with the Employer.

5. At the time of his injury, the Claimant's average weekly wage was $120.00.

It was further agreed that in the event that it was finally determined that the Act applied and the Claimant was entitled to benefits, all of the Claimant's medical expenses arising out of the injuries sustained on March 13, 1975, would be paid by the Employer.

Issues to Be Decided

The issues to be decided in this case are:

1. Jurisdiction (whether the Act applies).

2. Is the claim barred by the Statute of Limitations.

3. Whether the Notice of Controversion was timely filed.

4. The applicability of section 8(f) of the Act (33 U.S.C. Section 908(f)).

It was further agreed that in the event coverage under the Act was finally determined, the question of the applicability of section 18(b) of the Act (33 U.S.C. Section 918(b)) would be considered at a subsequent hearing which hearing would be scheduled by the Office of Administrative Law Judges.

Background of the Case:

In late 1974, United Steel Corporation purchased the Krista K. (formerly the Halliburton 202), a modified LCT having a length of approximately 106 feet and a displacement of approximately 186 tons. At the time of purchase, this vessel was in extremely poor condition and it was the intention of the United Steel Corporation to refit the Krista K. for the purpose of hauling machinery to Central America. In early 1975, the vessel was moved to the hover marine basin, located

in Titusville, Florida, in order to undergo repairs. Various local firms were engaged for the purposes of reworking the engines and the electrical system, as well as making repairs on the hull of the vessel.

At the time of the vessel's movement to the hover marine basin, the Employer employed the Claimant as a watchman. Mr. Holcomb had previously done general maintenance jobs for United Steel Corporation and the Employer but had never been engaged in any type of marine employment other than as a watchman aboard the Krista K several months previously. The Claimant's job at the time of his injury on March 13, 1975, was that of a night watchman whose job assignment at the particular time of the accident was to keep people off of the Krista K. The Claimant, at various times, did other types of assignments which involved watching houses and orange groves and general maintenance for either Robert W. Kirk and Associates, Inc., Kirk Realty, Inc. or United Steel Corporation. Claimant had worked sporadically for Robert W. Kirk and Associates, Inc. as a watchman for several years prior to the accident of March 13, 1975. In this connection, Mr. Kirk testified that the Claimant had a prior disability and it was agreed between the Claimant and Mr. Kirk that the Claimant would do no lifting over 20 pounds and no work other than as a watchman for Robert W. Kirk and Associates, Inc. Mr. Kirk testified (TR 46) that Robert W. Kirk and Associates, Inc. was incorporated as a Florida corporation for the purpose of property management, real estate brokerage and mortgage brokering. In answer to a specific question, Mr. Kirk testified that the Employer does not and did not own any vessels at any time.

On March 13, 1975, the Claimant drove a truck furnished by Mr. Kirk to the hover marine basin and parked it on or adjacent to the dock

at which the Krista K. was secured. At that time, the Krista K. was undergoing repairs by individuals and firms which had been hired for this purpose and was totally inoperable. Sometime during the evening, as the Claimant was sitting in the truck, he noticed a small boat approaching the Krista K. Since he had been directed to keep unauthorized persons off of the Krista K., the Claimant left his truck and walked across the dock, boarded the Krista K. and was walking in the direction from which the small boat was approaching when he stepped into an open hatch and fell ten to twelve feet into the hold landing on his neck and shoulder. It is undisputed that as a result of this injury, the Claimant is now totally and permanently disabled from working, though he is able to walk and drive a vehicle.

Jurisdiction

To remedy many problems which arose subsequent to the passage of the original Longshoremen's and Harbor Workers' Compensation Act, Congress, in 1972, amended the Act. These amendments, inter alia, broadened the definition of "navigable waters of the United States to include "any adjoining pier, wharf, drydock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel." (33 U.S.C. Section 903, as amended). At the same time, Congress amended the definition of the persons covered by the Act. Previously, so long as a work-related injury occurred on navigable waters and the injured worker was not a member of a narrowly defined class, which was specifically excluded from coverage, (33 U.S.C. Section 902 (2)), the worker would be eligible for compensation provided that his or her employer had at least one employee engaged in maritime employment. It was not necessary that the injured employee be so employed. Pennsylvania Railroad Co. vs. O'Rourke, 344 U.S.C. 34,

340-342 (1953). With the definition of "navigable waters" expanded by the 1972 amendments to include such a large geographical area, it became necessary to describe affirmatively the class of worker's Congress desired to compensate. It therefore added the requirement that the injured worker be "engaged in maritime employment" which it defined to include "any longshoreman or other persons engaged in longshoring operations, and any harbor-worker including a ship repairman, ship builder, and ship breaker but . . . not . . . a master of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." (33 U.S.C. Section 902(3)).

The 1972 amendments to the Act thus changed what had been essentially only a "situs" test of eligibility for compensation to one looking for both the "situs" of the injury and the "status" of the injured. Northwest Marine Terminal Company, Inc., et al vs. Caputo, et al, 432 U.S. ___, 53 L.Ed 320 (1977). It must, therefore, be determined whether the claimant in this case satisfies both of these requirements. If he does, coverage under the Act will follow. If he fails to satisfy either the "situs" or "status" tests, there is no jurisdiction under the Act.

Situs Test

There can be little question but that the place where the injury to the Claimant occurred falls within the area specified in the Act (33 U.S.C. Section 903(a)). Here, the injury occurred when the Claimant fell into an open hatch on a vessel which was moored to a dock situated on a navigable stream. Thus, I find that the injury suffered by the Claimant occurred on the "navigable waters of the United States" as that term is used within section 3(a) of the Act (33 U.S.C. Section 903(a)).

Status Test

Having satisfied the "situs" test, it now becomes necessary to determine whether the Claimant satisfied the "status" test. That is to say, was the Claimant, at the time of injury, an "employee" within the meaning of section 2(3) of the Act (33 U.S.C. Section 902(3))?

Three leading Circuit Court cases have greatly aided in defining which employees would be covered under the Longshoremen's and Harbor Workers' Compensation Act. In Weyerhauser Company vs. Gilmore, 528 F. 2d 957 (1975), the Court considered whether or not a pondman who was on navigable waters who was performing a job involving the sorting of logs and feeding them into a lumber mill for processing would be considered under the Longshoremen's Act when he was injured on a walkway which was floating on salt water of a bay of the Pacific Ocean. The Court presented (on page 959 of the case) the specific issue of whether claimant was, at the time of his injury, an employee engaged in maritime employment within the purpose and purview of Section 902(3) of the Longshoremen's and Harbor Workers' Compensation Act. The Court in reversing the Benefits Review Board decision, found that the Benefits Review Board had awarded coverage to the claimant on the basis that anyone covered under the Act prior to the 1972 Amendments must indeed be permitted to come within its protection in subsequent Amendments. The Circuit Court then went on in reviewing the case to find that the 1972 Amendments had radically changed the basis for the employee's entitlement to Federal Compensation. Quoting from the Court regarding decisions prior to the 1972 Amendments,

> We relegate those decisions to limbo because it is obvious to us that the 1972 Amendments radically changed the basis for an employee's entitlement to Federal Compensation. Prior to the amendment, an employee was entitled to Federal Compensation if his injuries occurred on navigable waters and his employer had an employee (not necessarily the injured employee) engaged in maritime employment; however, since the Amendment, an employee is entitled to Federal Compensation only if he is engaged in maritime employment and he is injured on navigable waters or an adjoining area customarily used for loading, unloading, repairing or building a vessel. (emphasis added) 528 F.2d 960 (1975).

The Court then reviewed what the intent of Congress was in the 1972 Amendments and came to the conclusion that in order for an employee to be under the Act, there must be a realistically significant relationship to "traditional maritime activity involving navigation and commerce on navigable waters" in order for the claimant to be covered under the Longshoremen's and Harbor Workers' Compensation Act. Based upon this conclusion, the Court reversed the Benefits Review Board, reinstated the Administrative Law Judge's decision, and found that Gilmore, although injured on navigable waters, could not be considered as being involved in maritime employment.

The next significant case was Jacksonville Shipyards, Inc. vs. Perdue, 539 F.2d 533 (CA-5, 1976). Again, the Court reiterated the fact that the 1972 Amendments had changed the Longshoremen's and Harbor Workers' Compensation Act from a purely situs oriented test to one also involving the status of the individual. Quoting from the Court in regard to the 1972 Amendments,

> From these statutes, the general thrust of the new Act's coverage is clear. Congress has replaced the old "water's edge" analysis with a two-part test which requires (1) that the claimant have been engaged in "maritime employment" and (2) that the injury have taken place upon the situs specified in the Act.

The Court then went on to give its consent to the previously mentioned Weyerhauser vs. Gilmore, Ninth Circuit Court case stated that,

> Our holding is that an injured worker is a covered "employee" if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was "directly involved" in such work.

Finally, we come to the most recent Third Circuit Court case, Dravo Corporation vs. Banks, F. 2d (CA-5, No. 77-1433, 1977). This case involved an unskilled maintenance employee at a shipbuilding and boatdock facility who had been injured while spreading salt on an icy walkway and pier. The facts of the case leave no question that Banks' job involved unskilled work, relating to plant maintenance such as cleaning up debris and doing other odd jobs. Both the Administrative Law Judge and the Benefits Review Board, had determined that Banks was involved in maritime employment and, thus, would be covered under the Longshoremen's Act. The Court, however, found that although Banks was injured in the proper situs, he did not occupy the proper status. Quoting from the Court,

> Banks' duties have no traditional maritime characteristics, but, rather are typical of the support services performed in any production entity, maritime or not. (emphasis added). Plant maintenance is required in any business. The government's brief inadvertently brings out a crucial distinction in this regard. After citing the integral part test . . . . . , it argues that Banks' function in clearing ice, was a necessary incident to the entire process of vessel construction. Clearing ice is a necessary incident to any operation. We suggest that in order to be covered, Banks' job should have been a necessary ingredient in the shipbuilding process which it is not. (emphasis added). Thus, the Court has now further defined the status requirement, and in order to be covered the individual must be involved in the "necessary ingredient" utilized in maritime employment.

Two decisions from the Benefits Review Board, themselves further define what will be considered as maritime employment. In Anderson vs. McBroom Rig Building Service, Inc., BRB No. 75-198), 5 BRBS 713, a roustabout who was injured while fixing an oil well platform located on navigable waters, was not considered to be engaged in maritime employment within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, Section 2(3). The Board stated on page 720,

> In examining the work activities of the claimant at the time of his injuries as required by Perdue, it was found below that on the day of the injury the claimant was first transported to the keyway by a small boat. Once there, claimant unloaded equipment to be used by him in his assigned task of unclogging a plugged flow line. The flow

> line is used for the transmission of petro-chemicals as part of the well's production function. While claimant was on the keyway in attempting to unclog the flow line, a pump attached to the flow line exploded, causing claimant's injuries. Although just prior to the explosion, claimant had unloaded his work gear from the small boat, to call claimant's activities at the time of the injury the work of loading or unloading a vessel would be much to (sic) great an entenduation of those terms as they are used to the Act.
>
> The Court then goes on further to say,
>
> In view of the above, we cannot hold that the claimant herein was engaged in "maritime employment" within the meaning of Section 2(3) of the Act.

Finally, in Toups vs. Chevron Oil Company, (BRB No. 76-453, 7 BRBS 261, the Board further determined that an employee who had been killed in an oil and gas production platform in the Gulf of Mexico, would not be considered a maritime employee within the meaning of the Longshoremen's and Harbor Workers' Compensation Act Section 2(3), and reversed the Administrative Law Judge's decision. In the decision which clearly recognized the Anderson vs. McBroom Rig Building Service, Inc. Supra, the Board in referring to their prior decision stated,

> That unless the activity bears a significant relationship to the traditional interests of admiralty in maritime commerce, actions arising from such activities will not be considered maritime for the purpose of applying maritime law. As in Anderson, the only maritime connection that decedent had was the fact that the platform on which he was injured was situated on

navigable waters.

Taking all of these cases and putting them together from Northeast Marine Terminal through the Dravo Corporation vs. Banks, it is clear that the pre-1972 cases considering only situs are no longer in effect.

In the instant case, claimant Holcomb, had absolutely no maritime training. He engaged in no maritime activity. He performed the job of night watchman for the vessel, land based projects for the same employer, while at the same time doing other general maintenance jobs for his employer. He had been assigned to perform his job as night watchman not on the vessel itself, but from a truck which was supplied by his employer specifically for the purpose of giving him a place to occupy while watching the vessel. He was given no specialized training or instructions in regard to watching the vessel except to keep people off, the same instruction used on any project, land or water. He was given no instruction on any maritime concern of the vessel. At the time of the accident the ship was being repaired and was inoperable, but the claimant took no part in the repair. Under Dravo the claimant's duties could not be considered "an ingredient part" of the shipbuilding or ship repairing process. His job duties and his job responsibilities were exactly the same when he was on land and when he was on water. Again, the situs test has been met, but the claimant cannot, by any stretch of words, be considered as occupying a status of maritime employment.

From the foregoing, I find that the injury to the Claimant occurred on a "situs" covered by the Act, but that the Claimant, at the time of injury, was not employed in a "status" covered by the Act.

Finding as I do that there is no coverage under the Act, it is not necessary to determine any other issues presented.

CONCLUSIONS OF LAW

1. The March 13, 1975, injury to the Claimant occurred on the "navigable waters of the United States" as that term is defined in Section 3(a) of the Act (33 U.S.C. Section 903(a)).

2. At the time of injury, the Claimant was not an "employee" as that term is defined in Section 2(3) of the Act (33 U.S.C. Section 902(3)).

3. The Act does not apply.

Order

The Claimant's claim for benefits under the Act is, in all respects, hereby denied..

/s/ Robert L. Ramsey
Robert L. Ramsey
Administrative Law Judge

Dated: September 14, 1978
Washington, D.C.

RLR:hls

JESSE HOLCOMB Claimant-Petitioner vs. ROBERT W. KIRK AND ASSOCIATES, INC. and FARM BUREAU MUTUAL INSURANCE COMPANY Employer/Carrier-Respondents	BRB NO. 78-566 DECISION and ORDER

Digest Section 1806

Syllabus

Claimant, an unskilled worker who acted as a night watchman for a maritime vessel, was not covered under the status test where his duties were support functions necessary to any production business rather than functions that were integral to maritime activities involving navigation and commerce over navigable waters.

Appeal from the Decision and Order of Robert L. Ramsey, Administrative Law Judge, United States Department of Labor.

John H. Evans, Titusville, Florida, for the claimant.

John M. Schwartz, Titusville, Florida, for the employer/carrier.

Before: SMITH, Chief Administrative Appeals Judge, MILLER and KALARIS, Administrative Appeals Judges.

KALARIS, Administrative Appeals Judge:

This is an appeal by the claimant from the Decision and Order of Administrative Law Judge Robert L. Ramsey (77-LHCA-1238) pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act as amended, 33 U.S.C. Section 901 et seq., (hereinafter referred to as the Act).

In 1974, United Steel Corporation purchased the Krista-K, a naval landing craft which was in extreme disrepair. This vessel was moved to a marina where engine, electrical and hull repair was to be performed by a variety of contractors. After it was repaired, the Krista-K was to be used to transport equipment to Central America.

An individual named Robert W. Kirk had some interest in the repair and safekeeping of this vessel. The exact nature of his interest does not appear in the record. Several times Mr. Kirk referred to the Krista-K as "my boat" although he stated that it was, in fact, owned by United Steel Corporation.

Robert W. Kirk was also the president of Robert W. Kirk and Associates, Inc., a real estate brokerage and management company. This company employed several persons as watchmen and as yard and grounds maintenance workers.

Claimant, Jesse Holcomb, is a fifty-three year old man with a second grade education. He had a pre-existing back and arm disability and could only perform light work. He had been employed, on and off, by Robert W. Kirk and Associates, Inc., doing light yard work and acting as a watchman for various properties owned and managed by that company. Claimant had undergone surgery sometime in late 1974 and, after he recovered from the surgery, he sought re-employment with Kirk and Associates.

Kirk rehired claimant in early January of 1975. Claimant's primary duty was to watch the Krista-K. He did this seven days a week, from dusk until morning. In addition, he occasionally did yard work and checked the security of one of employer's warehouses where yard maintenance equipment was stored. Claimant regularly boarded the Krista-K while he guarded it.

On March 13, 1975, at approximately 9:30 P.M., claimant was seated in a pick-up truck which employer had provided him, watching the Krista-K. He saw a boat approach. He boarded the Krista-K to see that the approaching boat did not interfere with her. Claimant walked across the vessel's deck and fell through an open hatchway. As a result of this injury, claimant is permanently and totally disabled.

Claimant was denied benefits under Florida law on the basis that his claim was covered under the Longshoremen's Act. Claimant filed a claim for benefits under the Act. A formal hearing was held before Administrative Law Judge Ramsey, who denied the claim, holding that claimant was not engaged in maritime employment.

In his Decision and Order, the administrative law judge reviewed much of the case law which was developed under the 1972 amendments to the Act. His conclusion, that claimant's employment did not bear a close enough relationship to maritime concerns was based in large part on a recent decision by the Court of Appeals for the Third Circuit. Dravo Corp. vs. Banks, 567 F.2d 593, 7 BRBS 197 (3rd Cir. 1977). We affirm the Decision of the administrative law judge that the claimant is not engaged in maritime employment.

In order to be covered under the Act a claimant must meet a two-fold test. He must be injured at an appropriate situs, as defined under Section 3(a) of the Act, and his function must meet the status definition established under Section 2(3). That Section provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . .

33 U.S.C. Section 902(3).

Claimant, in the instant case, was not a shipbuilder, ship-breaker, ship repairman, or longshoreman, nor was he engaged in longshoring operations. His duties also do not meet the definition of the term "harbor worker' as it has been defined by this Board. Stewart vs. Brown & Root, Inc., 7 BRBS 356, 365, BRB No. 76-451 (1978), aff'd, No. 78-1555 (4th Cir. Oct. 26, 1979). Since claimant is not engaged in any of the specific occupations mentioned in Section 2(3), we must consider whether he falls within the general category of workers who meet the status test, that is, we must determine whether claimant is "a person engaged in maritime employment".

As was noted in the leading decision dealing with the jurisdictional requirements of the Act, Northeast Marine Terminal Co., Inc. vs. Caputo, 342 U.S. 249 (1977), Congress failed to define the term "maritime employment." The legislative hsitory is equally silent on this point. Caputo , supra at 265.

The Court of Appeals for the Ninth Circuit has attempted to define the term, stating that an employee's work must "have a realistically significant relationship to traditional maritime activities involving navigation and commerce

over navigable waters" (emphasis added). Weyerhauser Co. vs. Gilmore, 428 F.2d 957, 3 BRBS 140 (9th Cir. 1976), cert. denied, 429 U.S. 868 (1976). However, in Caputo, supra at 270. Accordingly, we have held that the Weyerhauser definition is too restrictive insofar as it requires a relationship to "traditional" maritime activities, and "the traditional work and duties of a ship's service employment." This Board has announced a definition of the term "maritime employment" in conformance with the guidance of the Caputo decision. We have modified the Weyerhauser definition to provide:

> (A) claimant's employment must have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters in order for that employment to be deemed maritime employment under Section 2(3).

Sedmak vs. Perini North River Associates, 9 BRBS 378, BRB Nos. 77-896 (1978). 1/

1/ The Court of Appeals for the Second Circuit reversed the Board's denial of coverage in Sedmak, supra, in a decision titled Fusco vs. Perini North River Associates, 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979). That court concluded that anyone whose "major" or "principal" duties are performed over actual navigable waters is a maritime employee. The Second Circuit's decision has recently been vacated and remanded by the Supreme Court for reconsideration in light of P. C. Pfeiffer Co., Inc. vs. Ford, 100 S.Ct. 328 (1979). Fusco vs. Perini North River Associates, 48.

Claimant argues that his duties are maritime employment for several reasons. First, he argues that his duties watching the Krista-K were significantly related to the vessel's maritime purpose. Claimant asserts that he was hired so that the repair of the ship could be completed without interruption and so that it could begin its commercial purpose.

We conclude that claimant's duties as a night watchman do not have a realistically significant relationship to maritime activities involving navigation and commerce over navigable waters. We look to the decisions of the Courts of Appeals for the Third Circuit, Dravo, supra, and the Fourth Circuit, Newport News Shipbuilding & Dry Dock Co. vs. Graham, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1978), to assist us in this determination.2/ In Dravo, supra, the court held that a shipyard maintenance worker, who was injured while spreading sand on ice covered walkways, was not a maritime employee.

U.S.L.W.3452 (Jan 14, 1980). We decline to follow the Second Circuit's decision in Fusco and continue to apply the definition of maritime employment which we originally announced in Sedmak. Pruner vs. Ferma Corp., 11 BRBS 201, BRB No. 78-523 (1979).

2/ The case before us arose in the Fifth Circuit. The Court of Appeals for the Fifth Circuit has recently considered the jurisdictional requirements of the Act. Thibodaux vs. Atlantic Richfield Co., 580 F.2d 841 (1978), cert. denied , 47 U.S.L.W. 3771 (May 29, 1979). In that case, the Court interpreted Caputo, supra, to say that status exists if the claimant (1) worked in one of the maritime occupations specifically named in Section 2(3) of the Act (longshoring, harbor work, ship repair, ship-building, and ship breaking), or (2) if he was injured while performing a task integral to one of those named maritime occupations. Thibodaux, at 844-45. In regard to the

second part of this test, the Fifth Circuit did not accept the argument that a momentary or incidental diversion from a workers' principal duty would be sufficient to confer coverage. Thibodaux, at 845.

Claimant, in the instant case, was not employed as a longshoreman, harbor worker, ship repairman, shipbuilder or ship breaker. In addition, we do not consider claimant's activity at the moment of injury to be an integral aspect of one of those named, indisputedly maritime, occupations. According to our reading of Thibodaux, claimant did not have the status of a maritime employee.

The second part of the test propounded on Thibodaux is, to some extent, a "moment of injury" test. We have recently rejected the "moment of injury" as the proper time frame in which to determine the maritime nature of claimant's employment. We have decided that a substantial portion of an employee's duties should be maritime in order for him to meet the status test. Boudloche vs. Howard Trucking Co., BRBS , BRB No. 78-383 (Dec. 11, 1979). To the extent that Thibodaux conflicts with Boudloche, we have determined not to apply the Fifth Circuit's interpretation of Section 2(3).

> Banks' duties have no traditional maritime characteristics, but rather are typical of the support services performed in any production entity, maritime or not . . . . (C)learing ice is a necessary "incident" of any operation. We suggest that in order to be covered, Banks' job should have been a necessary "ingredient" in the shipbuilding process, which it was not.

Dravo, supra at 595-96.

The Third Circuit stated that a "close functional nexus" must exist between an individual claimant's job and the commercial or navigational industry in which he is employed." The Court of Appeals for the Fourth Circuit has defined the same "nexus" or "relationship" stating that a claimant's duties must be "essential" or an "integral part of" a maritime enterprise in order to be covered. Graham, supra at 170.

Claimant's duties, in the instant case, do not have the necessary "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters." Claimant guarded a vessel against the risk of vandalism. He was protecting the owner's property. His presence was not an integral part of the ship repair which was being carried out on the vessel by others. It also was not an integral factor in the vessel's ultimate commercial function.

Every business must make provisions for the security of its property, both real and personal. Claimant, in the instant case, was an unskilled worker who acted as a night watchman. There was no indication in the record that his services were particularly required because the property in question was maritime in nature. On the contrary, employer found it necessary to engage workers to guard his warehouse, and other properties he owned or managed, which were unrelated to maritime concerns.

Claimant's duties are analogous to those of Banks, the maintenance worker who performed unskilled jobs around the shipbuilding plant, such as cleaning up debris and spreading salt on icy walkways. Dravo, supra. Guarding, like maintenance work, must be performed as a part of any production business. In White vs. Newport News Shipbuilding & Dry Dock Co., 9 BRBS 493, BRB No. 78-163/A (1979), a worker who received, sorted, and stored the materials used in ship construction was also held not to

be covered under the Act. He performed a support service necessary to any manufacturing business.

In addition, we note that claimant's duties were not strictly limited to guarding a vessel. During this same time he also watched a storage building where employer kept maintenance equipment for his real estate business, and he did light yard work. These duties were also unskilled support services. The fact that claimant was hired to guard a vessel does not, in our view, transform his otherwise landbased, unskilled, support function into work with a realistically significant relationship to navigation and commerce.

Claimant also argues that watchmen were held to be maritime employees before the Act was amended and, therefore, this Board is bound to find that they are engaged in maritime employment under the amended language of Section 2(3). We are aware of the cases developed under the language of the original Act, which hold that watchmen of vessels are covered employees. Pre-amendment case law serves as a useful framework within which to define maritime employment, but we have previously held that it is not controlling. Sedmak, supra 3/

The pre-amendment law was passed to provide coverage for injuries sustained seaward of the gangplank, a geographic area in which it had been determined the states could not constitutionally extend coverage. Southern Pacific Co. vs. Jensen, 244 U.S. 205 (1917). In the period between the Jensen decision and 1927, the year the Longshoremen's Act was passed, the Supreme Court announced the "maritime but local" doctrine. Grant Smith-Porter Ship Co. vs. Rohde, 257 U.S. 469 (1922). According to this doctrine, injuries seaward of the Jensen line could only be compensated under state law if the employment, though maritime in nature, was of local concern.

When the Longshoremen's Act was passed it provided coverage for disability or death due to an injury on navigable waters if recovery could not validly be provided by state law. 33 U.S.C. Section 903(a) (1971). It also provided an exception for members of the crew of a vessel. 33 U.S.C. Section 903 (a)(1) (1971). There was no statutory requirement that the injured worker be engaged in maritime employment in order for the Act to apply, 33 U.S.C. Section 902(3) (1971); however, the employer had to have at least one employee employed in maritime employment. 33 U.S.C. Section 902(4)(1971).

The "maritime employment" requirement of the pre-amendment Act, Section 902(4), was considered fulfilled if some employee worked over navigable waters. E.g., Nogueira vs. New York, N.H. & H.R. Co., 281 U.S. 128 (1930). As a result, most pre-amendment cases tended to focus solely on the situs of the claimant's injury. If a claimant was injured over navigable water and did not meet one of the exceptions to coverage, i.e., member of a crew, maritime but local employment, the coverage provision of the Act was fulfilled, Section 903(a), and the requirement that any one employee of the employer be engaged in maritime employment was also fulfilled. Section 902(4). In summary, pre-amendment jurisdiction questions generally evolved into a simple inquiry regarding the situs of the injury.

3/ We note the decision in Brown & Root Inc. vs. Joyner, No. 78-1554 (4th Cir. October 26, 1979), aff'g 7 BRBS 608, BRB Nos. 76-471/A (1978), and aff'g Stewart vs. Brown & Root, Inc. 7 BRBS 356, BRB No. 76-451 (1978), wherein the Fourth Circuit relied on three pre-amendment cases in determining that the claimants in the cases before it were engaged in maritime employment. The Fourth Circuit explained that, in those pre-amendment cases, it had "examined the work of the individual claimants and concluded

that it was maritime employment" Joyner, slip op. at 6. The United States Supreme Court, however, rejected a definition of maritime employment based on pre-amendment cases which would have limited that term to work performed on navigable waters. The Court stated that interpretations of "the pre-1972 Act cannot obstruct Congress' obvious intent . . . ." P. C. Pfeiffer vs. Ford, 100 S.Ct. 328, 336, n.11 (1979).

These decisions support the position of this Board that pre-amendment cases which do not contain a functional analysis of the work of an employee, as contemplated by Congress when it added the status test to the Act, are no longer useful.

In 1972, Congress clearly added the status test, separate from the test for situs, to the Act. 33 U.S.C. Section 902(3). The status test requires a functional analysis of the injured employee's duties. See Sedmak, supra. The pre-amendment cases cited by claimant, which hold that nighwatchmen working on navigable waters are maritime employees, do not contain a functional analysis of the watchmen's duties and their relationship to navigation and commerce. They are not relevant to the inquiry we are engaged in under the status test of the amended Act.

Finally, claimant argues that the acts he was employed to prevent are acts of piracy, as defined by federal law, and are subject to the federal admiralty jurisdiction. 18 U.S.C. Section 1656 and 1659. Claimant asserts that, because his duties were related to the prevention of piracy, which is a hindrance to maritime navigation and commerce, they are maritime in nature.

We disagree. Claimant's presence near the vessel at night may have had a deterrent effect on crime. However, even if we assume that some of the crimes which he deterred may have been punishable under federal admiralty jurisdiction, this fact does not affect claimant's function.

Criminal acts are a danger to any business enterprise. As discussed above, claimant carried out a support service necessary to any business entity which owns property. Claimant may have deterred crime. A portion of that crime may have been subject to the admiralty jurisdiction. Some of the deterred criminal acts could have had significant effects on the cost or time required to repair the Krista-K. However, on the record before us, each of the links in this chain of reasoning is extremely speculative. Claimant's minimal effect on crime which might potentially be within the admiralty jurisdiction is not the realistically significant relationship with navigation and commerce which is required for employment to be deemed "maritime" under the Act.

We conclude that claimant's employment does not have either a sufficiently close functional nexus with maritime employment, Dravo, supra, or a realistically significant relationship to maritime employment. Sedmak, supra. Accordingly, the Decision and Order below, denying the claim for lack of jurisdiction, is affirmed.

SO ORDERED.

MILLER, Administrative Appeals Judge, Dissenting:

The basic facts in this case are not in dispute. The claimant was injured due to a fall through an open hatch of a vessel. As a result of that fall he is now permanently and totally disabled. The fall occurred in the course of his employment as a night watchman.

He was hired to guard the vessel from vandalism while it was undergoing extensive repairs to prepare it for use in overseas commerce. At the time of his injury, the vessel was moored to a dock on the navigable waters of the United States in the state of Florida.

The majority affirms the administrative law judge's denial of benefits under the Longshoremen's Act, as amended in 1972. That result is based upon their conclusion that the claimant was not engaged in "maritime employment" because his employment did not have a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters."

This claim was denied despite a prior determination denying the claimant workers' compensation benefits under the Florida state compensation act. That act expressly excludes from its protection "any employee covered by . . . the Longshoremen's and Harbor Workers' Compensation Act or the Jones Act." Fla. Stat. Section 440.09(2). If the majority's conclusion were correct, this case would present the tragic and anomalous result of a worker who was admittedly injured and rendered permanently and totally disabled while in the course of his employment upon the navigable waters of the United States, but who is without either a state or federal workers' compensation remedy for his loss of health and wage earning capacity.

The Longshoremen's Act was originally enacted more than a half century ago to end precisely this type of harsh and anomalous situation . 1/ Unlike my colleagues in the majority I cannot believe that the liberalizing amendments to the Act which were passed in 1972 must be so construed as to allow such a result to reoccur at this late date. Since I do not believe that the Act, as amended in 1972, compels or even permits such a result, I respectfully and vigorously dissent from the

conclusion reached by the majority that the claimant does not meet the "status" requirements of the amended Act.

1/ For a review of the background and original purposes underlying passage of the Act, see Nogueira vs. New York, New Haven & Hartford Railroad Co. , 281 U.S. 128 (1930); the Senate and House committee reports explaining the need for the Act are quoted in Crowell vs. Benson, 285 U.S. 22, 40 n. 5 (1932). See also Northeast Marine Terminal Co., Inc. vs. Caputo, 432 U.S. 249, 256-258 (1977).

Even if we were to evaluate claimant's work duties in terms of the "realistically significant relationship to traditional maritime activities involving navigation and commerce over navigable waters" standard developed in Weyerhauser Co. vs. Gilmore, 528 F.2d 957, 3 BRBS 140 (9th Cir. 1976), cert. denied 429 U.S. 868 (1976), I find it difficult to imagine any form of maritime activity more traditional than that performed by the ship's watch. 2/ In that case, the court found that "The occupational hazards intended to be guarded against are the traditional hazards to the ship's service employee arising in the course of his employment; i.e., the perils of the sea and an unseaworthy vessel recognized under maritime laws." 528 F.2d at 961.

2/ That we may look to the traditional nature of maritime employment in applying the amended Act was once again illustrated by the Supreme Court's use of a 1922 House of Representatives Committee Report describing the nature of longshoring activities in that pre-mechanized and -automated ere in P. C. Pfeiffer Co., Inc. vs. Ford, 100 S.Ct. 328, 336 n. 13 (1979) (hereinafter cited as Ford/Bryant).

Traditionally, the ship's watch function is one performed by a ship's officer or other member of the crew. Those persons have long enjoyed the protection of the workers' compensation - like remedy of "maintenance and cure", a remedy under the general maritime law which is not dependent upon a showing of employer negligence.3/ Even when a ship's crew was disbanded because a ship was to remain in port for extensive refitting, one of the persons who normally sailed aboard her would usually be retained to guard the vessel and her equipment.

An early case under the original version of the Longshoremen's Act analyzed the legal consequences of this traditional maritime practice. In Union Oil Co. vs. Pillsbury, 63 F. 2d 925 (9th Cir. 1933), a ship's third officer was paid off as a member of the crew, but re-engaged to serve as a night watchman while the vessel was undergoing overhauling in a floating dry dock. Wile in the course of his duties patrolling the vessel, he was shot by a burglar.

The deputy commissioner entered a compensation award under the Longshoremen's Act. After unsuccessfully seeking to enjoin enforcement of the award in district court, the employer took the case to the Court of Appeals for the Ninth Circuit. In sustaining the award under

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3/ In the event of their injury or death in the course of their duties, they or their survivors may also sue for damages based on unseaworthiness, a strict liability remedy for failure to provide a safe workplace, under the general maritime law or based on negligence under the Jones Act, 46 U.S.C. Section 688.

the Longshoremen's Act, the court quickly rejected employer's contention that claimant's remedies were under the Jones Act as "without merit" since claimant's injuries were sustained in the course of his temporary duties as a watchman rather than in the course of his regular duties as an officer of the vessel.

Employer's second contention on appeal, however, presented greater difficulties to the court. Employer relief upon the limitation contained in the original (1927) version of Section 3(a) of the Act which restricted its coverage to those cases in which "recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law." The gist of employer's argument was that the case came within the "maritime, but local" doctrine under which State compensation acts were allowed to cover certain injuries upon navigable waters because "the employment, though maritime in character, pertains to local matters, having only an incidental relation to navigation and commerce."

Before examining the court's resolution of this issue, it should be noted that neither the situs of the injury nor the maritime character of the employment was in issue before the court. The issue was whether the watchman's duties bore only "an incidental relation to navigation and commerce" and thus were reachable by the state compensation act or whether those duties bore a more significant relationship to navigation and commerce and thus came within the coverage of the Longshoremen's Act.

To resolve this issue in the Union Oil case and to resolve a similar issue concerning the applicability of the local workers' compensation act or the general admiralty law in another related case which the court also decided on the same day, involving a watchman who was lost at sea during a storn while guarding a commercial fishtrap anchored in the navigable

waters of the territory of Alaska, the court sought guidance from a series of nine decisions issued by the Supreme Court between 1922 and 1932. Those cases permitted a state workers' compensation act to be applicable to injuries suffered by a construction worker working upon a partially completed vessel afloat in navigable waters because "neither (the workers') general employment, nor his activities at the time (of injury), had any direct relation to navigation or commerce." Grant Smith-Porter Ship Co. vs. Rohde, 257 U.S. 469, 475-476 (1922). Under such circumstances the Court found "the parties contracted with reference to the state statute; their rights and liabilities had no direct relation to navigation, and the application of the local law cannot materially affect any rules of the sea whose uniformity is essential." 257 U.S. at 477. However, when work concerning the repair of a completed vessel afloat in navigable waters was the cause of the injury or death, the Court consistently held "the rights and liabilities of the parties are matters which have a direct relation to navigation and commerce." Great Lakes Dredge & Dock Co. vs. Kierejewski, 261 U.S. 479, 481 (1933). Under such circumstances general admiralty law applied and local workers' compensation acts were held inapplicable because "(r)epairing a completed ship lying in navigable waters had direct and intimate connection with navigation and commerce, as has been often pointed out by this court." John Baizley Iron Works vs. Span, 281 U.S. 222, 232 (1930), (emphasis added).

Having carefully considered the Supreme Court's various pronouncements, the court upheld the application of the Alaska workers' compensation act to the watchman assigned to guarding the fishtrap in Sunny Point Packing Co. vs. Faigh, 62 F.2d 921 (9th Cir. 1922), despite his presumed death at sea, because "(t)here, 'navigation and commerce' was not involved." 62 F.2d at 926. However, the

court sustained the application of the Longshoremen's Act to the case of the nightwatchman who was shot while guarding the vessel which was undergoing overhauling. The court concluded, "The services of a watchman on a vessel, during such overhauling cannot, in our judgment, be distinguished from the services considered in" the ship repair cases decided by the Supreme Court. 62 F.2d at 926.

Ten years later, the same basic issue concerning the maritime character of a nightwatchman's duties aboard a vessel was again presented to the same court. The facts in Hillcone Steamship Co. vs. Steffan, 136 F.2d 965 (9th Cir. 1943), closely resemble those of the case now before us. Claimant was injured as a result of a fall while guarding a vessel which was "indefinitely laid up", but which its owners intended to eventually return to navigation and commerce. The claimant apparently had not previously been a member of the ship's crew. After carefully reviewing the case law developed in the intervening decade, including decisions by two other courts of appeals in cases involving somewhat similar facts, 4/the court of appeals affirmed the district court's reversal of the deputy commissioner's determination that the claimant was not entitled to benefits under the Act because this injury did not occur in the course of maritime employment.

The specific issue before the court was whether the "employment of the (claimant), at the time he admittedly was injured, was maritime in character." 136 F.2d at 966.

4/ Seneca Washed Gravel Corp. vs. McManigal, 65 F.2d 779 (2nd Cir. 1933), and Lowe vs. Central Railway Co. of New Jersey, 113 F.2d 413 (3rd Cir. 1940).

The court resolved the issue as follows:

> It is not possible to determine from the findings on what the deputy commissioner based his conclusion, whether he believed a caretaker on board ship is not engaged in maritime work or whether he thought the ship itself was not a subject of admiralty jurisdiction. In either event we are satisfied he was wrong. This Court and other circuit courts of appeals have regarded the services of a watchman as being related to navigation, hence as falling within the terms of the Act.
>
> Appellee's services were no less maritime in character because performed on a vessel that was out of commission for an indefinite period of time . . . . But the Prentiss was intended to be reconditioned and put back into service on the high seas. She was a ship in every sense of the term, hence was clearly a subject of admiralty jurisdiction.

136 F.2d at 967.

Both before the administrative law judge and again before us on appeal, claimant has cited numerous cases, including those discussed above, supportive of his contention that the duties of a nightwatchman guarding a vessel constitute "maritime employment." Both the judge below and the majority of this Board decline to discuss the authorities upon which claimant's case is based. The majority states that "most pre-amendment cases tended to focus solely on the situs of claimant's injury" and "pre-amendment jurisdiction questions generally evolved into a simple inquiry regarding the situs of the injury." Whatever may be the general merits

of those conclusions, I cannot agree that they are applicable to the two cases discussed above. Although the majority concedes that "pre-amendment case law serves as a useful framework within which to define maritime employment", they reject without further discussion "(t)he pre-amendment cases cited by claimant which hold that night-watchman working on navigable waters are maritime employees, (because they) do not contain a functional analysis of the watchmen's duties and their relationship to navigation and commerce." I cannot concur in this characterization of the cases upon which claimant relies. As did the Court of Appeals for the Ninth Circuit nearly fifty years ago, I must conclude that the work of serving as a watchman on a vessel undergoing repairs cannot be distinguished from the actual work of performing those repairs.

I would find that the pre-amendment cases relied upon by claimant come within the class of cases which the Court of Appeals for the Fourth Circuit characterized as having "examined the work of the individual claimants and concluded that it was maritime employment." Brown & Root vs. Joyner, 607 F.2d 1087, 1089 (4th Cir. 1979), petition for cert. filed Jan. 2, 1980, No. 79-1136, 48 U.S.L.W. 3490. Like that court, I remain "confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments." 607 F.2d at 1090.

Although the Supreme Court has rejected arguments relying upon pre-amendment case law which were intended to "obstruct Congress' obvious intent to include some landbased workers within the coverage of the current Act," Ford/Bryant, 100 S.Ct. at 366 n.11, the Court has never indicated that it would reject reliance upon pre-amendment case law for the purpose of determining the maritime character of the employment of workers injured

upon the actual navigable waters of the United States.

For a thorough review of what I believe the term "Maritime employment" covers under the Longshoremen's Act, see my dissent in Sedmak vs. Perini North River Associates, 9 BRBS 378, 387, BRB No. 77-896 (1978), rev'd sub nom. Fusco vs. Perini North River Associates 601 F.2d 659, 10 BRBS 624 (2nd Cir. 1979), vacated and remanded 48 U.S.L.W. 3451 (U.S. No. 79-759 Jan. 14, 1980).

Having carefully reviewed the recent decision of the court of Appeals for the Fifth Circuit in Thibodaux vs. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978), cert. denied 99 S.Ct. 2820 (1970), I do not find it contrary to the position that the claimant here is covered under the Longshoremen's Act, as amended in 1972. As I read the cases relied upon by the claimant, they compel the conclusion that claimant's duties as a night-watchman constituted an integral part of the process of ship repair and thus satisfied the status requirement of the amended Act. 580 F.2d at 845. Alternatively, the cases relied upon by claimant are certainly sufficient to bring his duties as a watchman of a vessel within the scope of the "traditional maritime activities" and exposure to the "traditional hazards to the ship's service employee" described in Weyerhauser, supra. Accordingly, I would reverse the determination of the administrative law judge and remand the case for the further findings of fact and law required for the entry of an award of benefits under the Act.

Dated this 28th day
of February, 1980.

HOLCOMB v. ROBERT W. KIRK & ASSOCIATES, INC. 11001

Jesse HOLCOMB, Petitioner,

v.

ROBERT W. KIRK AND ASSOCIATES, INC., et al., Respondents,

and

U.S. Department of Labor,
Respondent.

No. 80-5246.

United States Court of Appeals,
Fifth Circuit
Unit B

September 8, 1981

Petition was filed seeking review of an order of the Benefits Review Board which affirmed a decision of an administrative law judge denying compensation under the Longshoremen's and Harbor Workers' Compensation Act. The Court of Appeals, Daniel Holcombe Thomas, District Judge, sitting by designation, held that watchman of a vessel docked in navigable waters at the ship repair yard for purpose of being readied for sea, who was injured aboard ship while in performance of his duties, was engaged in "maritime employment" within meaning of Longshoremen's and Harbor Workers' Compensation Act.

Reversed and remanded.

1. Workers Compensation 262

In order for an injury to be compensable under Longshoremen's and Harbor Workers' Compensation Act, the injured worker must be

"an employee" as defined in the Act and location of the injury must be upon navigable waters and both requirements must be satisfied in order for coverage to attach. Longshoremen's and Harbor Workers' Compensation Act, Section 2(3), 33 U.S.C.A. Section 902(3).

2. Workers' Compensation 52

Longshoremen's and Harbor Workers' Compensation Act is to be liberally construed in favor of injured workers. Longshoremen's and Harbor Workers' Compensation Act, Section 1 et seq., 33 U.S.C.A. Section 901 et seq.

3. Workers' Compensation 1348

There is a statutory presumption that an individual claim comes under coverage of Longshoremen's and Harbor Workers' Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, Section 1 et seq., 33 U.S.C.A. Section 901 et seq.

4. Workers' Compensation 262

An injured worker is a covered employee for purposes of Longshoremen's and Harbor Workers' Compensation Act if at time of his injury he was performing work of loading, unloading, repairing, building, or breaking a vessel, or although he was not actually carrying out those specified functions, he was directly involved in such work. Longshoremen's and Harbor Workers' Compensation Act, Section 2(3), 33 U.S.C.A. Section 902(3).

5. Workers' Compensation 262

Watchman of a vessel docked in navigable waters at the ship repair yard for purpose of being readied for sea, who was injured aboard ship while in performance of his duties, was engaged in "maritime employment" within meaning of Longshoremen's and Harbor Workers'

Compensation Act. Longshoremen's and Harbor Workers' Compensation Act, Sections 2(3), 3(a), 33 U.S.C.A. Sections 902(3), 903(a).

Petitions for Review of an Order of the Benefits Review Board.

Before KRAVITCH and HENDERSON, Circuit Judges and THOMAS*, District Judge.

DANIEL HOLCOMBE THOMAS, District Judge:

This is a petition for review by the claimant, Jesse Holcomb, from the affirmance by the Benefits Review Board of the decision and order of the Administrative Law Judge, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended 33 U.S.C. Section 901 et seq.

In 1974, United Steel Corporation, purchased a naval landing craft, the KRISTA K, which was in extreme disrepair. The vessel was moved to a marine where engine, electrical and hull repairs were to be performed by various contractors. After completion of repairs, the KRISTA K was to be used to transport equipment to Central America. Robert W. Kirk had some interest in the repair and safekeeping of this vessel. The exact nature of his interest does not appear in the record. While Kirk frequently referred to the vessel as "my boat", he also stated that it was in fact owned by United Steel Corporation. However, the ownership is not at issue in this matter. Kirk was also President of Robert W. Kirk and Associates, Inc., a real estate brokerage and management company. The claimant, Jesse Holcomb,

* District Judge of the Southern District of Alabama, sitting by designation.

is a fifty-three year old man with a second grade education. Mr. Holcomb, having had pre-existing back and arm disability, could only perform light work. Kirk hired Holcomb in early January 1975, for the primary duty as watchman for the KRISTA K. He did this seven days a week, from dusk until morning. He would perform other chores. Holcomb's primary function was to see that no one boarded the KRISTA K, this in order to protect against vandalism and theft. He regularly watched the KRISTA K from a pick-up truck furnished him by Kirk, but he frequently went aboard in the performance of his duties.

On March 13, 1975, about 9:30 P.M., Holcomb was aboard the KRISTA K when he saw another boat coming along-side. In order to watch the approaching boat, he attempted to cross the deck and fell through an open hatch. As a result of the injuries he sustained in the fall, he is permanently and totally disabled. Holcomb filed a claim for workmen's compensation benefits under Florida law. His employer and insurance carrier defended the claim with the assertion that the case was within the coverage of the Longshoremen's Act. The defense was sustained and Holcomb was denied any compensation under Florida law. He then filed the Longshoremen's Act claim, which gives rise to this proceeding. The Administrative Law Judge held that Holcomb was not "engaged in maritime employment", so as to meet the definition of a covered employee. 22 U.S.C. Section 902(3). The Benefits Review Board on appeal under the Longshoremen's Act, Section 21(b)(3), by a divided court affirmed. Holcomb and the Director then instituted the present review proceedings.

In this petition, the petitioners present three issues for review:

1. Whether employment that is performed aboard a vessel afloat is navigable waters,

without more, is "maritime employment" within the Longshoremen's Act Section 2(3).

2. Whether employment as a vessel watchman is "maritime employment" within Longshoremen's Act Section 2(3).

3. Whether the Florida administrative tribunal's judgment sustaining the affirmative defense of the employer and carrier to Holcomb's state compensation claim--that his injury was not compensable under the state law because it was within the coverage of the Longshoremen's Act--should have foreclosed either (a) The employer's contrary assertion or (b) relitigation of the question, in the Longshoremen's Act proceedings.

Of course, the question is whether or not Holcomb at the time in question, was covered by the Longshoremen's and Harbor Workers' Compensation Act. Section 3(a) of the Act is as follows:

> Compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marime railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel). *** 33 U.S.C. Section 903(a)(1976). (emphasis added)

The undisputed evidence shows that Holcomb, at the time of his injury, was aboard the KRISTA K upon navigable waters. It is undisputed that Holcomb sustained an injury as above defined and that the injury resulted in "disability".

1. E.g., S. Rep. No. 92-1125, 92nd Cong., 2d Sess. 12 (1972); H.R. Rep. No. 92-1441, 92nd Cong. 2d Sess. 10 (1972) U.S. Code Cong. & Admin. News 4698 ("longshoremen, harborworkers, ship repairmen, shipbuilders, shipbreakers, and other employees engaged in maritime employment").

(1) The two requirements, that the injured worker have been "an employee" as defined in Section 2(3) of the Act and that the location of the injury was upon navigable waters, have come to be known as the status and situs test, both of which must be met in order for coverage to attach. See, P.C. Pfeiffer and Co. vs. Ford, 44 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1970); Northeast Marine Terminal Company vs. Caputo, 432 U.S. 249, 97 S.Ct. 2348, 32 L.Ed.2d 320 (1977).

There is no dispute that the situs of Holcomb's injury was upon the navigable waters of the United States. Therefore, his disability is compensable under the Act if he was, at the time of the injury, an "employee" within the meaning of the Act. Section 2(3) is as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations and any harborworker, including ship repairman, shipbuilder, and shipbreaker . . . ." 33 U.S.C. Section 902(3) (1976).

Both from the fact of Section 2(3) and in light of its legislative history, the occupations and activities expresly included in the general term "maritime employment" are not exhaustive under its statutory scope. Tri-State Terminals, Inc. vs. Jesse, 596 F.2d 752 (7th Cir. 1979). Therefore, a worker engaged as a vessel watchman is a Section 2(3) "employee" if it can reasonably be concluded either that he is within the intended scope of the term "harborworker"

or at the time of injury, his employment was inclusive within the general term "maritime employment".

(2,3) As founded in Jacksonville Shipyards vs. Perdue, 539 F.2d 533 (5th Cir. 1976).[2] at page 541, "In deciding each appeal, we must remember that the Act, is to be liberally construed in favor of injured workers, see Voris vs. Eikel, 346 U.S. 328, 74 S.Ct. 88, 98 L. Ed.5(1953). We were also bound by a statutory presumption that an individual claim comes under the Act's coverage. 33 U.S.C. Section 920(a)."

Again, on page 545 in Jacksonville Shipyards, supra, "Our conclusion is that in the exercise of its discretion Congress could probably determine that 'new conceptions of maritime concerns' justified the extension of compensation coverage to workers in the immediate waterfront area who participate in ongoing shipbuilding operation. As the legislative history makes clear, Congress was concerned that under the former Act maritime workers were covered over the waters but not covered while performing similar or related work on shore. The inequities of the pre-1972 Act in this regard are obvious, and we feel that this concern was a 'maritime' one within the meaning of the Admiralty Clause. We have already indicated that, in defining 'maritime' concerns, we will not be limited by the rules which apply to tort and contract litigation."

Holcomb was employed to watch the KRISTA K which was in port for repairs, having aboard much sophisticated electronic gear. Within the included activities in Section 2(3) is harborworker, including ship repairman, shipbuilder and shipbreaker. While the word "watchman" is not set out in the statute, as

[2]Vacated and remanded on other grounds, 433 U.S. 904, 97 S.Ct. 2967, 53 L.Ed.2d 1088 (1979); 575 F.2d 79 (5th Cir. 1978); aff'd 444 U.S. 69, 100 S.Ct. 328, 62 L.Ed.2d 225 (1979).

held in the Tri-State Terminals case, supra, the included general terms of Section 2(3) are not exhaustive. The reasoning in Jacksonville Shipyards, supra, page 543, is helpful in the instant case. There the claimant, Nulty, was building a piece of woodwork which was to be installed in a new ship that had been launched but not yet commissioned. Most of Nulty's work was performed in the shop, 300 feet from where the ship was berthed, although at times he would go aboard a vessel to take measurements or to install or repair some woodwork. The Administrative Law Judge, the Benefits Review Board and the Court found that Nulty was working as a shipbuilder at the time of his injury, thus satisfying Section 902(3). "In our view, the only reasonable conclusion is that Nulty was directly involved in an ongoing shipbuilding operation." 539 F.2d at 544.

(4,5) As further found in Jacksonville Shipyards, supra, at pages 539-540, "Our holding is that an injured worker is a covered 'employee' if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was 'directly involved' in such work." While the word "watchman" was not included by Congress in the Section, Footnote 18 cited on page 540 is very interesting. Footnote 18 reads:

> See Gorman, The Longshoremen's and Harbor Workers' Compensation Act--After the 1972 Amendments 6 Journal of Maritime Law and Commerce 1, 10 (1974). By this holding, we do not mean to suggest that future cases may not bring to light other types of covered work which cannot be characterized as loading, unloading, repairing, building or breaking, and which

> are not 'directly involved' with these five types of work, but which nevertheless are sufficiently similar to fall within the Congressional scheme. No such additional category of covered work appears in the cases before us, but we will not foreclose the possibility of such categories arising in future litigation.

Sections 3(a) and 2(3) first appeared in the 1972 amendment, but it must be remembered that the 1927 statute had coverage provisions which were not withdrawn by the 1972 amendment. In dealing with Congressional intent concerning the 1972 amendment, we find on page 666 of Fusco vs. Perini North River Assoc., 601 F.2d 659 (2nd Cir. 1979), the following:

> When Congress did deal with coverage, it did not undertake a general study of the subject. Congress did not address itself to the problems raised in Parker, Davis, Pennsylvania Railroad, Calback or cognate lower federal court cases, nor did Congress comment upon the Calback doctrine that it was the Congressional purpose to give a federal compensation remedy to all workers, except crew members, injured seaward of the Jensen line. Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibity. What concerned Congress was injuries on land.

The case of Puget Sound Navigation Co. vs. Marshall, 31 F.Supp. 903 (W.D. Wash. 1940) held that employment as a watchman aboard a ferry boat laid up between its weekend runs, was sufficiently maritime in nature for coverage under the pre-1972 LHWCH, where an employee was drowned in navigable waters

in the course of such employment.

In Hillcone S.S. Co. vs. Steffen, 136 F. 2d 965 (9th Cir. 1943), the Ninth Circuit held that a watchman or caretaker injured in the course of his employment aboard a laid up steamship to have been engaged in maritime employment, for purposes of coverage of pre-1972 LHWCA. The Deputy Commissioner had denied coverage on the ground that the employee's service at the time of his alleged injury was not maritime in character. The district judge reversed the finding of the Deputy Commissioner and was affirmed by the Ninth Circuit Court of Appeals. The Court noted that the employment fell under none of the listed exceptions to the Act's coverage and that the job of caretaker or watchman on a vessel was regarded as being related to navigation and hence falling within the terms of the Act.

In Union Oil Co. vs. Pillsbury, 63 F.2d 925 (9th Cir. 1933), the Ninth Circuit held that a former third officer of a ship laid off when the ship entered port and later rehired as a night watchman while the ship underwent overhaul was engaged in maritime employment when shot by a burglar in the performance of his night watchman duties. Rex Investigative and Patrol Agency, Inc. vs. Collura, 329 F.Supp. 696 (E.D.N.Y. 1971) affirmed the deputy commissioner's finding that an injured watchman was covered under the pre-1972 LHWCH, even though his duties were primarily on the pier or the dock and that his presence on navigable waters when injured was merely a temporary incident to his employment.

There are also several statements of interest in the case of Northeast Marine Terminal Co. vs. Caputo, 432 U.S. 249. 97 S.Ct. 2348, 53 L. Ed.2d 320 (1977). On page 264 of this opinion on page 2357 of 97 S.Ct. we find: "But with the definition of 'navigable waters' expanded by the 1972 Amendments to include such a large

geographical area, it became necessary to describe affirmatively the class of workers Congress desired to compensate. It therefore added the requirement that the injured worker be 'engaged in maritime employment', which it defined to include 'any longshoreman or other person engaged in longshoring operations, and any harbor worker, including a ship repairman, shipbuilder, and shipbreaker, but . . . not . . . a master or member of a crew of any vessel. . . .'"[3]

Again on page 268, 97 S.Ct. on page 2359, of Northeast Marine Terminal, supra, we find language particularly appropriate for the instant case. "The Act 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.'"

We find that Holcomb at the time in question, was covered by the Longshoremen's and Harbor Workers' Act. A watchman of a vessel docked in navigable waters at a ship repair yard for the purpose of being readied for sea who is injured aboard ship while in the performance of his duties is surely within "maritime employment".

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[3]There is an interesting article in Vol. 64, No. 1 of the Virginia Law Review dated February 1978, on page 99, entitled, "Longshoremen, Longshoring Operations and Maritime Employment: A Dual Test of Status after Northeast Marine Terminal vs. Caputy." This article deals primarily with longshoremen, but this Court finds it helpful in that it is analogous to harborworkers.

His work was certainly an "integral part"[4] of and "directly involved in an ongoing ship repair operation."[5] We find that he meets both the "situs" and "status" requirements of the 1972 Act.

We do not hold that every watchman of a vessel in navigable waters comes under the Longshoremen's Act. We do hold that under the facts of this case, Holcomb, the petitioner, is covered under the Act.

Having disposed of the first two issues raised by the appellant, there is no need to address the third issue.

REVERSED AND REMANDED for Findings of Fact required for the entry of an award of benefits under the Act.

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[4]See, pg. 271, 97 S.Ct. p. 2361, Caputo, supra.

[5]See, pg. 544, Jacksonville Shipyards, supra.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

UNIT B

NO. 80-5246

JESSE HOLCOMB, and Director, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Petitioners,

versus

ROBERT W. KIRK AND ASSOCIATES, INC., ET AL.,

Respondents,

and

U.S. DEPARTMENT OF LABOR,

Respondent.

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On Petition for Review from an Order of the Benefits Review Board

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ON PETITION FOR REHEARING

(OCT. 07, 1981)

Before KRAVITCH and HENDERSON, Circuit Judges; and THOMAS, District Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

Florida Statutes Section 440.28

440.28 MODIFICATION OF ORDERS. - Upon a judge's own initiative or upon the application of any party in interest, on the ground of a change in condition or because of a mistake in a determination of fact the judge of industrial claims may at any time prior to 2 years after the date of the last payment of compensation pursuant to any compensation order, or at any time prior to 2 years after the date copies of an order rejecting a claim are mailed to the parties at the last known address of each, review a compensation case in accordance with the procedure prescribed in respect of claims in Section 440.25 and in accordance with such section, issue a new compensation order which may terminate, continue, reinstate, increase or decrease such compensation, or award compensation. Such new order shall not affect any compensation previously paid, except that an award increasing the compensation rate may be made effective from the date of the injury, and if any part of the compensation due or to become due is unpaid, an award decreasing the compensation rate may be made effective from the date of the injury, and any payment made prior thereto in excess of such decreased rate shall be deducted from any unpaid compensation, in such manner and by such method as may be determined by the judge of industrial claims.

Opposition

1

Office - Supreme Court, U.S.
FILED
JAN 25 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1109

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ROBERT W. KIRK AND ASSOCIATES, INC., et al.,

Petitioner/Appellant,

vs.

JESSE HOLCOMB,

Respondent/Appellee/Claimant,

and

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

PROCEEDING FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Attorney for Respondent

QUESTIONS PRESENTED FOR REVIEW

The Petitioner/Appellant has set forth the questions they wish to present before the court.

LIST OF PARTIES

1. Jesse Holcomb
2. Director, Office of Worker's Compensation Programs, United States Department of Labor
3. Robert W. Kirk & Associates, Inc.
4. Farm Bureau Mutual Insurance Company

NOTICE OF APPEARANCE

Please note the appearance of the undersigned as attorneys for the Respondent, JESSE HOLCOMB. The undersigned are members of the bar of this court, both having been admitted in 1981.

MICHAEL L. REDA, for the
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REFERENCE TO THE RECORD

Respondent/Claimant would incorporate the appendix presented by the Petitioner. References thereto will be made in the same manner as the Petitioner, to-wit: (R 25), with the number reflecting the page of Petitioners brief whereon the reference is found.

Respondent finds the Petitioners appendix to be incomplete and additions thereto will be included in the Respondent's appendix, contained herein. References thereto will be made as follows: (A-1), with the number reflecting the page of Respondent's brief whereon the reference is found.

Reference to the transcript of the proceedings before the Administrative Law Judge on June 9, 1978, which is contained within the appellate record, is as follows: (T-12), with the number reflecting the page of the transcript referenced to.

OPINIONS BELOW

The opinion of the Administrative Law Judge (R 25) is designated as OALJ No. 77-LHCA-1238, OWCP No. 6-30411, entered on September 14, 1978. The opinion of the Benefits Review Board (R 39) is reported at 11 BRBS 835 (1980). The opinion of the Court of Appeals for the Fifth Circuit (R 60) is reported at 655 F.2d 589, (5th Cir. 1981).

JURISDICTION

Respondent would adopt the statement of jurisdiction of the Petitioner.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

The statutes in question are 33 U.S.C. § 901 et. seq., (known as the Longshoremen's and Harbor Workers' Compensation Act, as amended) and more particularly the following:

> 33 U.S.C. § 902(3)
>
> Any person engaged in maritime employment, including longshoremen or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder and shipbreaker...
>
> 33 U.S.C. § 920(a)
>
> In any proceeding for the enforcement of a claim for compensation under the Act it shall be presumed, in the absence of substantial evidence to the contrary - (a) That the claim comes within the provisions of this Act.

STATEMENT OF THE CASE

Respondent will not adopt the Petitioners statement of the facts. The United States Court of Appeals, Fifth Circuit, clearly and succinctly set forth the facts in its decision. The following is a recitation of the facts with appropriate supporting citations.

In late 1974, United Steel Corporation purchased the Krista K., a seagoing vessel having a length of approximately 106 feet and a displacement of approximately 186 tons. At the time of purchase, this vessel was in extremely poor condition and it was the intention of the United Steel Corporation to refit the Krista K. for the purpose of hauling machinery to Central America (R-28). In early 1975, the vessel was moved to the Hover Marine Basin, located in Titusville, Florida, in order to undergo the stated repairs (R-28). Various local firms were engaged in reworking the engines and the electrical system, as well as making repairs on the hull of the vessel (R-29).

At the time the vessel was brought in for repairs, the Petitioner employed the Respondent, Holcomb, as a watchman or security guard to protect and guard the vessel and expensive radios, compasses and other equipment,such as refrigerators and deep freezers located thereon (R-29, R-40; T-31, 35, 78). The Respondent guarded the vessel seven days a week from dusk until dawn and regularly boarded the Krista K. while he guarded it (R-41; T-60, 61).

On March 13, 1975, the Respondent was guarding the Krista K. in accordance with the instructions he had received. Sometime during the evening a small boat approached the Krista K. (R-30). Since he had been directed to keep unauthorized persons off of the Krista K., the Respondent walked across the deck and was walking in the direction from which the small boat was approaching when he stepped into an open hatch and fell ten to twelve feet into the hold, landing on his neck and shoulder (R-30). It is undisputed that as a result

of this injury, the Respondent is now totally and permanently disabled from working (R-30).

The Respondent sought benefits under the Florida Workmen's Compensation Act. In the proceedings under the state Act, the Petitioner defended the claim on the basis that the Respondent was covered under the federal Act and could not be covered under the state Act. Attached hereto as A-1 is the Order of denial and the memorandum upon which it was based, which was made a part of the record of the Court of Appeals at the request of that court. The Respondent was denied benefits under the Florida Workmen's Compensation Act on the basis that his claim was covered under the Longshoremen's and Harbor Workers' Compensation Act. Respondent then filed for benefits under the federal Act (R-41). Contrary to the Petitioner's statement in his brief (R-3), the Respondent did <u>not</u> have approximately one month after the original denial of coverage

under the Act by the Administrative Law Judge to reapply in the state system and, in fact, said time had run approximately one month before the decision by the Administrative Law Judge. See R-74 and A-1.

It has been stipulated by the parties in this action, that at the time of the injury the employer/employee relationship existed between the Petitioner and the Respondent; that the Respondent was within the course and scope of his employment; that the Respondent as the result of his injuries, is totally and permanently disabled since March 13, 1975; that at the time of his injury his average weekly wage was $120.00 and that the place of the injury was within navigable waters (R-27, 28).

The Administrative Law Judge denied the Petitioner's claim on September 14, 1978, relying primarily on Dravo Corp. v. Banks, 567 F.2d 593 (3rd Cir. 1977) and upon the incorrect premise that pre-1972 cases were of no effect (R-37, R-41).

The Respondent appealed the decision and order of the Administrative Law Judge to the Benefits Review Board (hereinafter "BRB"). The BRB affirmed the Administrative Law Judge on February 28, 1980, with Administrative Appeals Judge Julius Miller dissenting. (R-39). The BRB concluded that the Respondent's duties were analogous to those of the maintenance worker claimant in the Dravo case stating, "Guarding, like maintenance work, must be performed as a part of any production business." (R-46). The BRB expressly rejected existing case law in favor of its own standards announced in its Boudloche case (R-45). Subsequent to the BRB decision, the Court of Appeals reversed the Boudloche case. Boudloche v. Howard Trucking Co., Inc., 632 F.2d 1346 (5th Cir. 1980).

The Respondent appealed the BRB decision to the Court of Appeals for the Fifth Circuit, which reversed and remanded the case. The Court of Appeals held:

> We find that Holcomb at the time in question, was covered by the

> Longshoremen's and Harbor Workers' Act. A watchman of a vessel docked in navigable waters at a ship repair yard for the purpose of being readied for sea, who is injured aboard ship while in the performance of his duties is surely within "maritime employment." (R-70).

And further held:

> We do not hold that every watchman of a vessel in navigable waters comes under the Longshoremen's Act. We do hold that under the facts of this case, Holcomb... is covered under the Act. (R-71).

ARGUMENT

The dispute over Respondent's claim for benefits, pursuant to the Longshoremen's and Harbor Workers' Compensation Act (hereinafter "Act"), centers on whether the Respondent is an "employee" as defined in the Act. The Act defines emplyee as:

> Any person engaged in maritime employment, including longshoremen or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder and shipbreaker...
>
> 33 U.S.C. § 902(3)

The Administrative Law Judge (hereinafter "ALJ") and the Benefits Review Board (hereinafter "BRB") ruled that the Respondent did not come within the statutory definition of "employee" because he was not engaged in "maritime" employment. (R-38, R-50). The ALJ and BRB decisions set forth facts concerning the Respondent's duties. The United States Court of Appeals for the Fifth District (hereinafter "appellate court"), after reviewing the facts as found

by the ALJ and the BRB, reversed and remanded the cause, finding that under the facts of this case, the Respondent was an "employee". (R-65).

The Petitioner requested that this court exercise its judicial discretion yet cites no "special and important reasons", as is required by rule 17 of the United States Supreme Court Rules. As stated within the Appellate decision, this cause was decided "under the facts of this case" (R-65). (emphasis added).

Petitioner, in question number two of its brief (R-i), claims that the appellate court abused it's discretion by substituting its own factual interpretation in place of that of the BRB. The Petitioner implys, in its brief, that the issue whether Respondent is an "employee" within the Act is a factual determination reserved for the ALJ and BRB. This is not true for two reasons. First, the courts are the final interpreters of the meaning of the

Act. National Steel v. U.S. Dept. of Labor, 606 F.2d 875 (9th Cir. 1979). Second, decisions by the ALJ and BRB that a person is within a statutory class are ultimate conclusions open to court review to determine if the facts found support the ultimate conclusion. Hullinghorst Industries, Inc. v. Carroll, 650 F.2d 750 (5th Cir. 1981); Warner Co. v. Norton, 137 F.2d 57 (3rd Cir. 1943). In the instant case, the appellate court accepted the facts found by the ALJ and BRB and determined that based on those facts, the clear ultimate conclusion was that the Respondent was an "employee". The appellate court specifically held that the Respondent's work was "certainly an 'integral part' of and 'directly involved in an ongoing ship repair operation'". (R-65). This is not surprising as other courts have come to the same conclusion. See, Arbeeny v. McRoberts Protective Agency, 642 F.2d 672 (2nd Cir. 1981); Hillcone S.S. Co. v. Steffen, 136 F.2d 965 (9th Cir. 1943), Union

Oil Co. v. Pillsbury, 63 F.2d 925 (9th Cir. 1933).

The Petitioner, apparently attempting to draw attention away from the appellate court's statement that the case was decided on the facts, incredulously argues that the appellate court has set forth a per se rule of coverage for night watchmen (R-6, R-13, R-16), a position which we agree would be untenable and which is rejected by the appellate decision (R-65). The Petition for Certiorari proceeds to dissect the appellate decision attacking each "i" that is not dotted and each "t" that is not crossed.

The Petitioner argues that the appellate decision states and relies on the 33 U.S.C. Section 920(a) presumption of coverage which, Petitioner argues, creates a conflict between the 11th Circuit and other circuits. Even if the appellate decision did erroneously rely on the presumption, where is the conflict? The

instant case is a decision from the Fifth, not Eleventh Circuit. The Eleventh Circuit has not ruled on this point. The Petition states that the Fifth Circuit in another case has ruled that the presumption does not apply to jurisdictional questions (R-10). Thus, conflict, if any, is within the Fifth Circuit itself and not "in conflict with the decision of another federal court of appeals". (Rule 17, United States Supreme Court Rules). Further, concerning the presumption, the appellate decision is expressly based on the facts of the case and merely states that the presumption exists and the court is "also" bound by it (R-66). Clearly, the factual basis for the decision was independent of the presumption, as stated within the decision.

The Petition also objects to the consideration of pre-1972 case law by the appellate panel (R-vi). This question has been raised and it has been held that such pre-1972 decisions are not stripped of their

precedential value by the 1972 amendment to the Act. Brown & Root, Inc., v. Joyner, 607 F.2d 1087 (4th Cir. 1979) cert. denied, 446 U.S. 981, 100 S.Ct. 2960, 64 L.Ed. 2d 837 (1980), reh. denied, 448 U.S. 912, 101 S.Ct. 26, 65 L.Ed. 2d 1172. There is no conflict in this area. The Weyerhauser v. Gilmore decision, 528 F.2d 957 (9th Cir. 1976), cert. denied, 97 S.Ct. 179, 429 U.S. 868, 50 L.Ed. 2d 148 (1976), cited by the Petitioner, relegates to limbo only those pre-1972 decisions which found coverage for an employee based, not upon his "maritime" employment, but rather upon the "maritime" employment of a co-employee, which was the hallmark requirement pre-1972. The 1972 amendment to the Act shifted the focus of the "maritime" requirement from any employee to the injured employee. Weyerhauser, supra. Thus, if the injured employee was also the "maritime" employee in a pre-1972 case, then the case would still have precedential value. Brown & Root, Inc., supra. The pre-1972

cases cited by the appellate court in the instant case came within the category of those still having precedential value.

The Petition questions the propriety of the appellate court basing it's decision on a remanded and revised decision (R-viii; R-15, 16). The appellate court clearly did not "base" their decision in the instant case on the Fusco decision cited in Petitioner's brief. Fusco v. Perrini North River Assoc., 601 F.2d 659 (2d Cir. 1979). The appellate court merely cited a portion of the Fusco decision in its review of the area in question. If the appellate court had decided to follow that portion of the Fusco decision which had already been reviewed and found to be erroneous by the United States Supreme Court, then there would have been no need to discuss and evaluate the factual circumstances surrounding Respondent's employment and the appellate court would not have made its decision "under the facts of this case". (R-65). It is also important to note that the appellate

court was aware of the status of the Fusco decision at the time its decision in the instant case was rendered, as the same is contained in the appellate court briefs and was discussed during oral argument. Further, the appellate decision expressly states that it does "not hold that every watchman of a vessel in navigable waters comes under the Longshoremen's Act." (R-65).

CONCLUSION

The United States Supreme Court does not and should not exercise its certiorari jurisdiction for mere academic exercise. The limited reviewing power to which the court is confined is, at least partially, due to the creation of the United States Courts of Appeals. A grant of certiorari and consideration of this cause on the merits would not resolve any questions the Court of Appeals is not capable or authorized to resolve. The

issues raised in the Petition for Certiorari demonstrate that this case is one of isolated significance, decided, as stated in the appellate decision on the facts of the case and therefore, is of no important precedential value. The United States Supreme Court does not grant certiorari to review evidence and discuss specific facts.

The Petitioner seeks the exercise of the court's judicial discretion merely to obtain another forum for his position. The certiorari power of the Supreme Court is reserved for "special and important reasons" and thus, should not be exercised here.

STATE OF FLORIDA
DEPARTMENT OF COMMERCE
OFFICE OF THE JUDGE OF
INDUSTRIAL CLAIMS
DISTRICT "L"

Jesse H. Holcomb
Claimant

vs.

Robert W. Kirk & Associates
Florida Southern Farm Bureau
Employer/Clarrier

Claim No. 412-36-3756

D/A: 3/13/75

/

John H. Evans, Esq., Titusville, for Claimant

Robin A. Lloyd, Esq., Vero Beach, for Employer/Carrier

O R D E R

THIS CAUSE came on to be heard before me, the undersigned Judge of Industrial Claims on May 24, 1976 in Satellite Beach, Brevard County, FL.

Pursuant to the evidence and testimony presented, as well as the stipulations between the parties, I hereby make the following findings:

1. That the Judge of Industrial Claims has jurisdiction of the parties and the subject matter hereof.

2. That the claimant received an injury by accident arising out of his employment on March 13, 1975 when he fell through an open

hatch of a vessel on which he was working as a night watchman. As a result of the accident, the claimant was severely injured, received considerable medical attention and remains disabled.

3. That at the time of the accident, the claimant was covered by the Longshoreman's and Harbor Workers Compensation Act or the Jones Act and is therefore not to be afforded coverage for his disability by the Florida Workmen's Compensation Law. At the time of this accident, the claimant was employed as a night watchman aboard the employer's vessel to prevent theft and vandalism. The vessel was undergoing repairs in order that it could transport cargo to the British Honduras. The vessel was docked in navigable waters.

WHEREFORE, it is the ORDER of the undersigned Judge of Industrial Claims that the claim filed in this cause be and the same is hereby DENIED AND DISMISSED.

DONE AND ORDERED at Satellite Beach, Brevard, County, Florida on this 19th day of August, 1976.

Judge of Industrial Claims

THIS IS TO CERTIFY that the foregoing Order was entered on the 19th day of August, 1976, and that a copy thereof was sent on said date by regular mail to the claimant, employer, and all other interested parties at the last known address of each.

Secretary to the Judge of Industrial Claims

FLORIDA INDUSTRIAL COMMISSION
WORKMEN'S COMPENSATION DIVISION
TALLAHASSEE, FLORIDA

CLAIM NO. 412-36-3756 D/A: March 13, 1976

EMPLOYEE: Jess H. Holcomb
535 N. Washington Ave., Apt.6
Titusville, Florida 32780

Represented by:
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P. O. Box 669
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EMPLOYER: Robert W. Kirk & Associates
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Titusville, Florida 32780

CARRIER: Florida Southern Farm Bureau
P. O. Box 730
Gainesville, Florida 32601

Represented by:
Robin A. Lloyd, Esquire
JONES, PAINE & FOSTER, P.A.
P. O. Box 3406
Vero Beach, Florida 32960

MEMORANDUM OF LAW

WHETHER THE INDUSTRIAL CLAIMS COMMISSION HAS JURISDICTION TO AWARD WORKMEN'S COMPENSATION PAYMENTS FOR AN INJURY WHICH OCCURRED ON A VESSEL LOCATED IN NAVIGABLE WATERS OF THE UNITED STATES

The Claimant contends that his injury is compensable under Florida's Workmen's

Compensation Statute, and as a basis therefore relies upon the "local concern" or "twilight zone" doctrine. See Davis vs. Department of Labor and Industries of Washington, 317 &.S. 249 (1942), cited in Claimant's Memorandum. In the past, this doctrine has been invoked to allow coverage under either state or federal compensation acts where jurisdiction is uncertain. However, determination of the issues here does not require reliance upon the disfavored "local concern" doctrine. Patashnick-Badgett Dredging Incorporated vs. Whitfield, 269 So.2d 36, 42 (4th D.C.A. Fla. 1972).

The central question in the determination of jurisdiction is whether the claimant is an "employee" under the provisions of the Longshoremen's Act), 33 U.S.C. Sec. 901, et seq.

To establish a non-maritime character of employment, Claimant has cited Peter vs. Arrien, 325 F. Supp. 1361 (1971), wherein the Court stated that the term "maritime employment" was directed to the employer and not the work the employer was performing. While this may have been a correct statement of the law at the time the decision was rendered, it is not true today. Significant changes were made in the Longshoremen's Act by Congress in 1972. Benefits were increased, coverage was extended to shoreside areas and the maritime character of the employee's own labor was made sufficient to bring him under the act's control as evidenced by the following statutory language:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any

harbor worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net. 33 U.S.C. Sec. 902(3) (emphasis added).

An employee is engaged in maritime employment if his activities are directly concerned with a maritime purpose. Peter vs. Arrien. Management of a vessel, loading cargo, care of equipment and cargo or performance of any task essential to enable it to accomplish its purpose on navigable waters are within the term maritime employment". Beasley v. O'Hearne, 250 F.Supp. 49, 53 (1966) (emphasis added).

In a deposition taken on April 27, 1976, Mr. Robert Kirk was asked:

Q Now, was this the type thing, then, that Mr. Holcomb was responsible for, guarding that vessel at all times and when these men came, he could leave and return by the time they left?

A Yea, I wanted some body there all of the time. We had radios and stuff in the wheelhouse that I didn't want to go over there and strip out and have to pay some engineer to come back and put it all back up again. TR P. 43, 44.

Clearly, the purpose of Claimant's employment at the time of his accident was the protection and care of equipment installed on the vessel, such equipment being essential to the accomplishment of the vessel's navigational purpose.

Claimant would have the Court believe he has discovered a conflict in case law on the question of whether a night watchman on a vessel is engaged in maritime employment and cites Posavec vs. Merritt-Chapman & Scott Corporation, 106 F.Supp. 170 (1952) as authority. But a careful reading of Posavec reveals no conflict, there the Court found that the barge involved in the accident had no navigational purpose, it was used in construction work and that work had no maritime qualities. Thus the ruling of Posavec was not based upon the Claimant's duties as a night watchman, the determining issue was the non-maritime nature of the endeavor as a whole. Obviously, such is not the issue here. There is no question that the accident herein occurred on a vessel, the vessel was being overhauled and even had some cargo loaded (see Deposition of Claimant, TR Pg. 23 line 15) in preparation for return to navigation. In the same manner, Claimant's reliance upon the decision in Sunny Point Packing Company vs. Faigh, 63 F.2d 921 (9th Cir. 1933), is also misplaced. The same Court, in its decision in Union Oil Company vs. Pillsburry, 63 F.2d 925 (1933), decided the same day and cited at page 923 in the Sunny Point Packing Company opinion said, in its Union Oil Company decision:

> A consideration and comparison of the several decisions of the Supreme Court lead to the conclusion that while the watchman's employment was local and incidental to "navigation and commerce" in Sunny Point Packing Company vs. Faigh (cite), it is not of that character in the instant case. There "navigation and commerce" was not involved;

> the fish trap though in navigable waters was anchored and fastened by a long cable to the shore. That was a definite, more or less permanent location. Here we are dealing with a vessel in port undergoing her usual overhauling in order that she may resume her navigation. The services of a watchman on a vessel during such overhauling cannot, in our judgment be distinguished from the services considered in (citing cases). In those cases it was held that state compensation acts could not apply.
>
> 63 F.2d at 926.

Similar decisions were reached by the Courts in Hillcone S. S. Company vs. Steffen, 136 F.2d 965, Rex Investigative and Patrol Agency, Inc. vs. Collura, 329 F. Supp. 696 (1971) and Atlas Iron and Metal Company vs. Hesser, 177 So.2d 199 (Fla. 1965).

The weight of authority clearly supports the carrier's position that the claimant was engaged in maritime employment at the time of his accident. As a consequence of employment of that character, the claimant is within the area of federal interest. The provisions of the Longshoremen's Act apply to the Claimant and his employment and hereby preclude coverage under the Florida Workmen's Compensation Act and as a consequence, deprive this Court of jurisdiction over this matter.

Respectively submitted

Robin A. Lloyd, Esq.
JONES, PAINE & FOSTER
P. O. Box 3406
Vero Beach, FL 32960

BY_____
Attorneys for Employer

I HEREBY CERTIFY that copy hereof has been furnished to John Evans, of CROFTON, HOLLAND, STARLING, HARRIS & SEVERS, P.A., Post Office Box 669, Titusville, Florida, 32780, by mail this 18th day of June, 1976.

CERTIFICATE OF FILING

STATE OF FLORIDA
COUNTY OF BREVARD

BEFORE ME, the undersigned authority, personally appeared MICHAEL L. REDA, who, after being first duly sworn, deposes and says:

1. That I am counsel for the Respondent, Holcomb, in this cause and I am a member of the Bar of the Court.

2. That I have personal knowledge of the facts contained herein.

3. That the Respondent's Brief In Opposition To Petition For Certiorari, with required copies, has been deposited for mailing, with first class postage prepaid and properly addressed to the Clerk of the Court, with the United States post office in Titusville, FL, on January 25, 1982, which is within the time allowed for filing.

MICHAEL L. REDA

SWORN to and SUBSCRIBED to before me this 25th day of January, 1982, in the County and State aforementioned.

Virginia Graham

Notary Public
State of Florida at Large

My Commissioner:

Notary Public, State of Florida at Large
My commission expires February 18, 1983
Bonded with Lawyers Surety Corp.

(SEAL)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have forwarded 40 copies of the foregoing Brief in Opposition to Petition for Certiorari by United States mail to the Office of the Clerk, Supreme Court of the United States, Washington, D.C. 20543, 3 copies by United States mail to Joshua T. Gillelan, II, Esq., U.S. Department of Labor, 200 Constitution Ave., N.W., Suite N-2620, Washington, D.C. 20210, 3 copies by United States mail to Paul Smalbein, Esq. P.O. Box 6086-C, Orlando, FL, 3 copies by United States mail to John M. Schwartz, Esq., P. O. Box 1657, Titusville, FL and 3 copies to the Solicitor General, Department of Justice, Washington, D.C. 20530 this 25 day of January, 1982.

CIANFROGNA, TELFER
& EVANS, P.A.

BY: Michael L. Reda

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Opposition

2

Office - Supreme Court, U.S.
FILED
FEB 1 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1109

In the Supreme Court of the United States

OCTOBER TERM, 1981

ROBERT W. KIRK AND ASSOCIATES, INC., PETITIONER

v.

JESSE HOLCOMB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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Washington, D.C. 20210

QUESTION PRESENTED

Whether a watchman who was injured aboard a vessel while performing his regular duties was "engaged in maritime employment" within the meaning of Section 2(3) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1109

ROBERT W. KIRK AND ASSOCIATES, INC., PETITIONER

v.

JESSE HOLCOMB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 60-71) is reported at 655 F. 2d 589. The opinion of the Benefits Review Board (Pet. App. 39-59) is reported at 11 B.R.B.S. 835. The opinion of the administrative law judge (Pet. App. 25-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1981. A petition for rehearing was denied on October 7, 1981 (Pet. App. 72-73). The petition for a writ of certiorari was filed on December 4, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. United Steel Corporation purchased a naval landing craft, the KRISTA K, in 1974. The extremely dilapidated vessel was moved to a marina for repair, prior to being used to transport equipment to Central America (Pet. App. 62).

Robert W. Kirk had some interest in the repair and safekeeping of the vessel (Pet. App. 62). Kirk was also president of petitioner Robert W. Kirk and Associates, Inc., a real estate brokerage and management company (*ibid.*). That company employed several individuals as watchmen and grounds maintenance workers (*id.* at 40). Respondent Jesse Holcomb, who had been employed by petitioner in the past as a watchman and as a yard worker (*ibid.*), was hired by Kirk in 1975 to watch the KRISTA K (*id.* at 63). Holcomb performed his duties seven days a week from dusk until morning (*ibid.*). His primary function was to see that no one boarded the vessel, in order to guard against theft and vandalism. Holcomb regularly watched the vessel from a pickup truck furnished by Kirk, but also frequently went aboard the KRISTA K in the performance of his duties (*ibid.*).

Holcomb was aboard the KRISTA K on March 13, 1975, when he saw another boat coming alongside (Pet. App. 63). In order to watch the approaching boat, Holcomb attempted to cross the deck and in so doing fell through an open hatch. Holcomb is permanently and totally disabled as a result of the injuries he received in the fall (*ibid.*).

2. Respondent Holcomb first filed a claim for benefits under the Florida workers' compensation statute, but petitioner and its insurance carrier resisted the state claim on the ground that the case was within the coverage of the federal Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.* (Pet. App. 63). Holcomb's state claim was denied on that basis (*ibid.*).

Holcomb then filed a claim under the LHWCA. The administrative law judge determined that Holcomb was not "engaged in maritime employment" within the meaning of Section 2(3) of the Act, 33 U.S.C. 902(3), and accordingly rejected his claim (Pet. App. 37-38, 63).

Holcomb appealed to the Benefits Review Board under 33 U.S.C. 921(b). In a divided decision, the Board ruled that Holcomb was not covered by the Act. The Board stated (Pet. App. 44) that Holcomb's night watchman duties lacked "a realistically significant relationship to maritime activities involving navigation and commerce," as required by the Board's earlier decision in *Sedmak* v. *Perini North River Associates*, 9 B.R.B.S. 378, rev'd *sub nom. Fusco* v. *Perini North River Associates*, 601 F. 2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028, aff'd on remand, 622 F. 2d 1111 (1980), cert. denied, 449 U.S. 1131 (1981). The Board's dissenting member concluded that Holcomb's duties "constituted an integral part of the process of ship repair and thus satisfied the status requirement" of the LHWCA (Pet. App. 59).

3. Respondent Holcomb sought judicial review of the Board's decision under 33 U.S.C. 921(c). The Director, Office of Workers' Compensation Programs, filed a brief in support of Holcomb's petition for review. The court of appeals reversed, holding that Holcomb was engaged in maritime employment within the meaning of the Act (Pet. App. 60-71). The court noted (*id.* at 64-65) that with the passage of the 1972 amendments to the Act, a claimant must satisfy both the situs requirement of Section 3(a), 33 U.S.C. 903(a), and the status requirement of Section 2(3), 33 U.S.C. 902(3), in order to come within the Act's coverage. It was undisputed that Holcomb, who at the time of his injury was aboard a vessel, was injured "upon the navigable waters of the United States" (Pet. App. 65). The only question, then, was whether Holcomb was a maritime employee within the meaning of Section 2(3).

In analyzing the status question, the court of appeals observed (Pet. App. 68) that "the [original] 1927 statute had coverage provisions which were not withdrawn by the 1972 amendment." Quoting from the Second Circuit's first decision in *Fusco* v. *Perini North River Associates, supra*, 601 F. 2d at 666, the court stated (Pet. App. 68) that in enacting the 1972 amendments, " 'Congress took it for granted that injuries occurring upon water were covered and would remain covered. There was no indication that Congress considered withdrawing existing coverage or eligibility. What concerned Congress was injuries on land.' " The court then relied on pre-1972 cases which held that the duties of vessel watchmen, to the extent performed aboard ship, were within the Act's coverage (*id.* at 68-69). Accordingly, the court concluded that Holcomb met both the situs and status coverage requirements of the amended Act, stating (*id.* at 70-71; footnote omitted):

> A watchman of a vessel docked in navigable waters at a ship repair yard for the purpose of being readied for sea who is injured aboard ship while in the performance of his duties is surely within "maritime employment." His work was certainly an "integral part" of and "directly involved in an ongoing ship repair operation."

DISCUSSION

The court of appeals' holding, that a watchman injured aboard a vessel on navigable waters is engaged in "maritime employment," is correct. The decision, however, appears to conflict with the rationale employed in similar cases in the Second Circuit, as we noted in the Director's pending petition for certiorari in *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, petition for cert. pending, No. 81-897 (filed Nov. 12, 1981). Because of this conflict, we suggest that the Court hold this petition in abeyance, pending either the denial of a writ of certiorari or a decision on the merits in the *Perini* case.

1. The decision below is correct for the reason primarily relied upon by the court of appeals: because respondent Holcomb was injured aboard a vessel and would have been covered by the pre-1972 LHWCA, he remains covered after the 1972 amendments. See *Hardaway Contracting Co.* v. *O'Keeffe*, 414 F. 2d 657 (5th Cir. 1968). As fully discussed in the Director's pending petition in *Perini North River Associates*, Congress in 1972 moved the coverage of the LHWCA shoreward to include workers engaged in maritime employment injured on new, broadly defined "navigable waters" adjacent to the water's edge. 33 U.S.C. 903(a). The indisputable congressional purpose behind the 1972 amendments was to expand coverage "to protect *additional* workers." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 1 (1972) (emphasis added). The definition of covered employees under amended Section 2(3), 33 U.S.C. 902(3), "does not exclude * * * employees traditionally covered * * *." S. Rep. No. 92-1125, *supra*, at 16. Thus, a vessel watchman injured on actual navigable waters, like Holcomb, who would have been covered before the 1972 amendments, remains covered now as an employee engaged in "maritime employment."

The necessity for according coverage to marine workers injured over actual navigable waters is well illustrated by the present case. Holcomb's initial claim for worker's compensation benefits under Florida law was denied on the ground that his injury fell within the coverage of the LHWCA. His subsequent claim under the LHWCA, however, was denied because it lacked a "realistically significant relationship to maritime activities involving navigation and commerce over navigable waters" (Pet. App. 44). Only the Fifth Circuit's willingness to find coverage under the amended Act for this particular injury occurring upon

actual navigable waters prevented Holcomb from being denied both state and federal compensation remedies.[1]

Notwithstanding the correctness of the Fifth Circuit's decision, the court's reasoning does appear to conflict with decisions from the Second Circuit that deny coverage to workers injured on actual navigable waters. See, *e.g.*, *Fusco* v. *Perini North River Associates*, 622 F. 2d 1111 (1980), cert. denied, 449 U.S. 1131 (1981); *Churchill* v. *Perini North River Associates*, 652 F. 2d 255 (1981), petition for cert. pending, No. 81-897 (filed Nov. 12, 1981). Because the Director has challenged the correctness of the Second Circuit's position in these cases, however, this petition should be held pending either the denial of a writ of certiorari or a decision on the merits in No. 81-897.

2. The court of appeals' finding of coverage is correct even without regard to the fact that Holcomb was injured aboard a vessel. Holcomb was "[a] watchman of a vessel docked in navigable waters at a ship repair yard for the purpose of being readied for sea * * *" (Pet. App. 70). His watchman duties were an "integral part" of the ship repair operation (*id.* at 71, quoting *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 271 (1977)). This alone satisfies the status requirement of Section 2(3) of the amended Act, 33 U.S.C. 902(3), without regard to the fact that Holcomb would have been covered by the pre-1972 Act. Accord, *Arbeeny* v. *McRoberts Protective Agency*, 642

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[1]The court below properly relied upon pre-1972 cases in concluding that watchmen and port guards injured upon actual navigable waters are engaged in "maritime employment" at the time of injury. These cases "examined the work of the individual claimants and concluded that it was maritime employment." *Brown & Root, Inc.* v. *Joyner*, 607 F. 2d 1087, 1089 (4th Cir. 1979), cert. denied, 446 U.S. 981 (1980). "[E]mployment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments." 607 F. 2d at 1090.

F. 2d 672, 675 (2d Cir. 1981), cert. denied, No. 80-2180 (Oct. 5, 1981) (pier guards are covered maritime employees because their duties are "an integral part of the loading and unloading of cargo").

Thus, the decision of the court below can be upheld on an alternative ground that does not conflict with decisions of the Second Circuit. However, the primary basis for the court of appeals' holding was that Holcomb was injured aboard a vessel and would have been covered by the pre-1972 Act; even the court's determination that Holcomb's watchman duties were an integral part of the ship repair operation appears to be based, in large part, on the fact that he was injured aboard a vessel (Pet. App. 70-71). Because this reliance on the situs of Holcomb's injury appears to conflict with the Second Circuit's decision in *Churchill* v. *Perini North River Associates, supra*, we believe it would be appropriate to hold this petition pending disposition of the *Perini* case.

CONCLUSION

The petition for a writ of certiorari should be held pending the disposition of the petition and, if certiorari is granted, a ruling on the merits in *Director, Office of Workers' Compensation Programs* v. *Perini North River Associates*, No. 81-897.

Respectfully submitted.

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